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2 UNITED STATES BANKRUPTCY COURT  
3 SOUTHERN DISTRICT OF NEW YORK

4 - - - - - x  
5 In the Matter of:

6 Case No. 12-12020-mg

7 RESIDENTIAL CAPITAL, LLC, ET AL.,  
8 Debtors.

9 - - - - - x  
10 SEALINK FUNDING LIMITED,

11 Plaintiff,

12 -against- Adv. Proc. No. 12-02051-mg

13 DEUTSCHE BANK AG, ET AL.,

14 Defendants.

15 - - - - - x  
16 United States Bankruptcy Court  
17 One Bowling Green  
18 New York, New York

19  
20 March 5, 2013

21 10:02 AM

22  
23 B E F O R E:

24 HON. MARTIN GLENN

25 U.S. BANKRUPTCY JUDGE

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2 (CC: Doc no. 2887) Debtors' Motion Pursuant to Sections 105(a)  
3 and 363(b) of the Bankruptcy Code for an Order Authorizing the  
4 Debtors to Appoint Lewis Kruger as Chief Restructuring Officer  
5 filed by Gary S. Lee on behalf of Residential Capital, LLC.

6

7 (CC: Doc no. 2943) Debtors' Application Under Bankruptcy Code  
8 Section 327(a), 328(a) And 363 For The Entry Of An Order  
9 Modifying The Retention And Employment Of FTI Consulting Inc.  
10 As Financial Advisor To The Debtors Pursuant To Second  
11 Addendum, Nunc Pro Tunc to December 5, 2012, And For Related  
12 Relief (related document(s)526, 902) filed by Lorenzo Marinuzzi  
13 on behalf of Residential Capital, LLC.

14

15 Doc# 2918 Motion to Extend Exclusivity Period for Filing a  
16 Chapter 11 Plan and Disclosure Statement / Debtors' Motion for  
17 the Entry of an Order Further Extending Their Exclusive Periods  
18 to File a Chapter 11 Plan and Solicit Acceptances Thereof

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2 **Adversary proceeding: 12-02051-mg Sealink Funding Limited v.**  
3 **Deutsche Bank AG et al (CC: Doc# 9, 10, 11, 21, 22) Motion to**  
4 **Remand to New York State Supreme Court**

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20 ALSO PRESENT:

21 PAMELA WEST, RESIDENTIAL CAPITAL, LLC (TELEPHONICALLY)  
22 LEWIS KRUGER, Chief Restructuring Officer

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1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. We're here  
3 in Residential Capital, number 12-12020.

4 Mr. Lee?

5 MR. LEE: Good morning, Your Honor. Gary Lee from  
6 Morrison & Foerster on behalf of the debtors.

7 Your Honor, as I mentioned last week, during our  
8 status report, we filed two motions that relate to the plan  
9 process. One is a motion to appoint Lewis Kruger as the chief  
10 restructuring officer, and that's docket number 2887. And the  
11 second is a motion to extend the debtors' exclusive period to  
12 file a Chapter 11 plan, and that's docket 2918.

13 Your Honor, while the parties filed joint responses to  
14 both those motions and we filed a joint reply, if Your Honor  
15 doesn't object, I'd address them one by one, starting with  
16 docket number 2887, which is the motion to appoint Mr. Kruger.

17 THE COURT: Please.

18 MR. LEE: Your Honor, as you're aware, the standard  
19 for approving and compensating a CRO under Section 363 of the  
20 Bankruptcy Code is whether the debtors used reasonable business  
21 judgment. ResCap's board of directors engaged in a very  
22 thorough selection process and determined, in good faith, that  
23 the appointment of Mr. Kruger was in the best interests of  
24 estates.

25 As I mentioned last week, Your Honor, Mr. Kruger has

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1 already spent a significant amount of time meeting with the  
2 debtors and the various creditor constituencies. He's also met  
3 with Judge Peck on several occasions regarding the mediation  
4 process, most recently yesterday, Your Honor.

5 Your Honor, no party has objected to Mr. Kruger's  
6 appointment. The debtors believe that the absence of an  
7 objection is a reflection on Mr. Kruger, his vast restructuring  
8 experience, and I believe, a reflection on the fact that the  
9 creditors believe that he will help to move the plan process  
10 forward. His guidance and insight has already proved very  
11 valuable in getting us to where we are with the creditors'  
12 committee.

13 We submitted a revised form of order to Your Honor's  
14 chambers yesterday. The only open issue is Mr. Kruger's  
15 success fee, which is the subject of discussion with the board  
16 and the creditors' committee. And once the parties reach  
17 consensus on that issue, we'll come back to Your Honor.

18 Accordingly, Your Honor, and in light of the absence  
19 of any objections, we'd ask Your Honor to approve the  
20 appointment of Mr. Kruger as the debtors' CRO pursuant to  
21 Section 363 of the Code.

22 THE COURT: Does anybody wish to be heard with respect  
23 to the CRO motion?

24 Mr. Eckstein?

25 MR. ECKSTEIN: Your Honor, good morning. Kenneth

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1 Eckstein on behalf of the unsecured creditors' committee.

2 I can speak briefly to this. The committee does  
3 not -- did not object to this, and in fact, the committee  
4 supported the appointment of a CRO and believes that Mr. Kruger  
5 is well suited to play the role in this case.

6 The idea of introducing a CRO was a subject that the  
7 committee had discussed with the debtor back in November. The  
8 issue was adjourned in December when Judge Peck was introduced  
9 as the mediator and the parties focused on mediation while at  
10 the same time focusing on the closing of the sale.

11 The decision to bring on a CRO was a decision that the  
12 debtor made. It was presented to the creditors' committee, and  
13 it was somewhat surprising that it was presented without  
14 discussion. Nonetheless, we ultimately sat with the debtor and  
15 with Mr. Kruger, and in short order, were able to come to what  
16 we thought was a very constructive conclusion as to Mr.  
17 Kruger's role.

18 We worked with the debtor on scope, and the debtors'  
19 reply reflects a revised scope that the committee is  
20 comfortable with. We believe that Mr. Kruger and the scope  
21 that has been assigned to him reflects his expertise and  
22 experience in the restructuring field, which is clearly an  
23 issue that this case has to grapple with, provides a level of  
24 independence that we believe is going to be helpful and  
25 important to advancing the case, and we believe will instill

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1 greater confidence on the part of the creditor constituencies  
2 that the debtor is going to be guided in an independent fashion  
3 that hopefully will lead to a consensual plan or to a process  
4 that will lead to a resolution of the case on a, if not  
5 consensual basis, then an efficient litigated basis, if that's  
6 the path we have to follow.

7 I'll save the rest of my remarks for the discussion of  
8 exclusivity, but we believe this is an appropriate step to be  
9 taken in the case, and we think that, particularly with the  
10 agreement that was reached with the creditors' committee as to  
11 how we're going to proceed over the next sixty days, our hope  
12 is that Mr. Kruger will use the next sixty days to try to  
13 advance a negotiated plan process, either with AFI or without  
14 AFI, but either way, advance a negotiated plan process.

15 So we understand that the success fee element of Mr.  
16 Kruger's engagement is something that's being deferred, and we  
17 intend to deal with that in a subsequent fashion, but with that  
18 reservation, the committee is supportive of the retention.

19 THE COURT: Thank you, Mr. Eckstein.

20 Anybody else wish to be heard with respect to the CRO  
21 motion?

22 Mr. Lee, did you want to say something else?

23 MR. LEE: Nothing, Your Honor.

24 THE COURT: All right. The Court grants the motion.  
25 Let me say -- and I know we're going to separately talk about

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1 the exclusivity motion; I'm going to hear that, and maybe I  
2 should save my comments for that, but I do link it to the CRO  
3 motion. When the debtor made its first motion to extend  
4 exclusivity back in August of 2012, when the Court ruled on  
5 that motion, I approved only a very short extension of  
6 exclusivity until December 20th, 2012. And in granting that  
7 relatively short extension, I made clear that I was  
8 dissatisfied with the progress in developing a plan and  
9 expected the parties to begin serious negotiations, attempting  
10 to develop a consensual plan.

11 There were subsequent motions to extend exclusivity.  
12 In some respects, there has been good progress in the case in  
13 terms of the auctions of the loan servicing platform, the  
14 legacy loan portfolio, and the recent closing of those sales.  
15 Where there clearly has been less progress has been in the plan  
16 process. The debtors made the motion for appointment of a  
17 mediator, and that motion was granted and I appointed -- with  
18 his consent, obviously, I appointed Judge Peck, my colleague  
19 Judge Peck, who I know has worked tirelessly, and continues --  
20 and I know various of the pleadings filed have described those  
21 mediation efforts as stalled, but I know Judge Peck continues  
22 to work tirelessly to try and move the parties to consensus.

23 I view the appointment of Mr. Kruger as the CRO as a  
24 very important step in what I still hope will be the  
25 development of a consensual plan. Obviously, Mr. Kruger has

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1 very extensive experience as an insolvency professional, and  
2 it's clear that he's very highly respected. He has an  
3 important role. I think the changes that were made to the  
4 scope of the CRO's engagement here emphasize the importance of  
5 his independence in developing and trying to get the parties to  
6 develop a consensual plan. And it's certainly the Court's hope  
7 that Mr. Kruger's efforts will come to fruition with a  
8 consensual plan or -- I'm reluctant to sign on to something, a  
9 process that's going to lead to substantial litigation; that  
10 may be where this heads.

11 The costs of this case are fairly extraordinary,  
12 frankly. The sooner a plan can be developed, a disclosure  
13 statement approved, voting, hopefully confirmation of a plan,  
14 the sooner the substantial administrative expenses can be  
15 reduced. There are a lot of difficult issues on the Court's  
16 plate right now that are important to this case, but I do view  
17 the CRO as having an important role in trying to move this  
18 forward.

19 I'll raise it now; I know there was a motion to extend  
20 exclusivity, and there's the CRO motion, but the initial order  
21 appointing Judge Peck as the mediator -- and that's ECF 2519 --  
22 described an initial period for mediation through February  
23 28th, 2013. I haven't seen a motion to extend it, but I'm  
24 doing it *sua sponte*.

25 MR. LEE: Your Honor, I actually was going to address

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1 that right after the CRO motion. We've heard from both the  
2 committee and from AFI that in their view they would obviously  
3 like to see the mediation continue. We discussed it with Judge  
4 Peck, and Judge Peck said irrespective of whether the order had  
5 or hadn't terminated, he was continuing as if the mediation was  
6 ongoing.

7 THE COURT: Right.

8 MR. LEE: And all of the parties are proceeding on  
9 that basis.

10 THE COURT: Well, I think it's important -- I don't  
11 expect any disputes with respect to confidentiality of the  
12 mediation, but I think it's important that an order be in place  
13 that makes clear that the protections associated with the  
14 mediation are there.

15 So I intend to enter an order, sua sponte today, that  
16 will extend the term -- Judge Peck's term as mediator to and  
17 including May 31, 2013, or such earlier date as Judge Peck  
18 declares in a written order that the mediation is at an impasse  
19 and should be terminated forthwith. And all of the remaining  
20 terms of that December 26th, 2012 order remain in place. The  
21 order that I intend to enter is just a short order that extends  
22 the mediation to the date I've given, May 31, on the same --  
23 otherwise on the same terms as the earlier order.

24 I view -- we'll see what -- I know there's still  
25 disputes about extension of exclusivity, and I'll hear those;

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1 I'm not ruling on those. But I view the three as inextricably  
2 linked, frankly, the appointment of CRO, the continuing role of  
3 and willingness -- and I checked with Judge Peck to make sure  
4 he had no problems about me entering this order, and he  
5 expressed his willingness to continue his efforts, as long as  
6 it appears to bear any reasonable chance of success. So while  
7 people have described it as stalled, I know Judge Peck has  
8 really been pretty tireless in continuing his efforts, and I  
9 certainly appreciate that very much. So I just want to say I  
10 do approve the CRO motion, and I will enter an order extending  
11 the appointment of Judge Peck as the mediator.

12 MR. LEE: Thank you, Your Honor. I turn the podium  
13 now over to Mr. Marinuzzi, if I may.

14 THE COURT: Thank you very much.

15 MR. LEE: Thank you.

16 MR. MARINUZZI: Good morning, Your Honor. Lorenzo  
17 Marinuzzi, Morrison & Foerster, on behalf of the debtors.

18 Your Honor, I'm going to switch gears for a second.  
19 I'm on page 8 of the agenda. And the other uncontested item on  
20 the agenda for today's hearing is the debtors' application to  
21 modify the terms of FTI Consulting's retention. It's a motion  
22 that we filed on February 18th. There's been no objection. We  
23 spoke to Mr. Masumoto this morning, and he indicated he was  
24 okay with the relief requested.

25 Briefly, Your Honor, around Thanksgiving, or shortly

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1 after Thanksgiving, after the sale was approved, the company  
2 realized that it was a challenge to get the closing done and it  
3 required that FTI utilize its experience to provide some  
4 project management services to Walter, at the direction of the  
5 debtors, to get the transaction closed sooner rather than  
6 later, recognizing that this was not something that FTI signed  
7 up for, but also recognizing needing to move forward quickly.  
8 FTI immediately jumped into those efforts and provided those  
9 services. Walter has agreed to reimburse the estates for the  
10 costs of those services, which are approximately 900,000  
11 dollars. So it's not costing the debtors anything, but it's  
12 also not penalizing FTI for providing those services.

13 So unless the Court has any questions, we'd ask that  
14 the order be entered.

15 THE COURT: Does anybody else -- anybody have anything  
16 they want to say on this motion?

17 All right. It's granted.

18 MR. MARINUZZI: Thank you, Your Honor.

19 Your Honor, that brings us to the debtors' application  
20 to extend the exclusive plan filing and solicitation periods.  
21 Your Honor, the motion was filed on February 14th, originally  
22 scheduled to be heard on February 28th, and Your Honor entered  
23 a bridge order extending exclusivity through today.

24 Originally, as filed, the debtors were requesting a  
25 ninety-day extension of the plan filing and solicitation

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1 periods. After discussions and -- many discussions with the  
2 creditors' committee, we've shortened that request to sixty  
3 days, respectively.

4 Your Honor, since we were last here on December 20th,  
5 requesting an extension, much has happened in the debtors'  
6 cases. Your Honor is aware, obviously, that we closed the sale  
7 of substantially all of the debtor's -- well, a substantial  
8 portion of the debtors' assets and netted over four billion  
9 dollars in recoveries.

10 Your Honor has seen enough paper about how  
11 unprecedented it was, but it really was unprecedented. It took  
12 a significant amount of effort from the committee's management,  
13 its directors and its professionals, to get it closed. Now, in  
14 anticipation of closing those sales and looking forward to the  
15 next chapter of these cases -- and I think Your Honor hit many  
16 of the points that I'm going to present in my presentation --  
17 the company recognized that to really move the case forward, we  
18 had to have a mechanism for effective discussions and  
19 negotiations with the creditors, the creditors' committee, and  
20 AFI. And one of the fundamental cornerstones of those efforts  
21 was the debtors' application to request the appointment of a  
22 mediator, which Your Honor did late last year.

23 From the debtors' perspective -- and others, I am  
24 sure, will stand up and echo these comments -- the involvement  
25 of the mediator has been tremendously helpful in moving things

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1 forward and helping to frame disputes. The mediation has  
2 commanded the attention of not just the debtors, but the  
3 committee, it's members, other creditors not on the committee,  
4 and AFI. It's been an inclusive project.

5 In addition, another important aspect of moving these  
6 cases forward, obviously, as Your Honor noted, was the  
7 appointment of Mr. Kruger as the debtors' CRO. We believe that  
8 having Mr. Kruger, as the representative of the debtors'  
9 estates in the mediation and negotiations, is going to be  
10 incredibly helpful and an important step forward.

11 So Your Honor, focusing on the motion, I believe the  
12 motion addresses properly the Adelphia factors, but I'm happy  
13 to walk through each of them in the context of this case, if  
14 Your Honor would like me to do so.

15 THE COURT: No, I think the issue that I do want to  
16 hear about, and if you want to let Mr. Shore speak first, it's  
17 the issue that the ad hoc committee raises. They're  
18 obviously -- the debtors' motion to extend exclusivity was  
19 modified, pursuant to an agreement with the creditors'  
20 committee, and giving -- I'm not sure it uses these terms, but  
21 in effect, for the sixty-day period, giving the creditors'  
22 committee a veto right over any plan that would be proposed.  
23 Mr. Shore and the ad hoc committee, whether -- you know, they  
24 filed an objection, then they filed a statement, so it's in the  
25 statement; it isn't denominated an objection, but it's in the

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1 statement. I guess I read it as an objection of sorts to this  
2 aspect of the extension of exclusivity. So do you want to  
3 address that now or do you want to wait for Mr. Shore to speak?

4 MR. MARINUZZI: No, Your Honor. I'm happy to explain  
5 the settlement that we've reached with the committee. Now, I  
6 think we need to set the stage for what we're trying to  
7 accomplish going forward. And we all recognize the sale is  
8 closed, there are some adjustments to be made, escrows to be  
9 released, et cetera, but for the most part we're now in the  
10 plan negotiation stage. And --

11 THE COURT: We're supposed to be in the plan  
12 negotiation stage --

13 MR. MARINUZZI: Well, it is now --

14 THE COURT: -- since last year, but --

15 MR. MARINUZZI: It is now the most important task for  
16 these debtors, as opposed to closing a sale.

17 Realistically, there are three ways to get out of this  
18 case with a plan, as we see it. Others can argue there are  
19 more. But first possible plan: we can file a plan that has  
20 the support of every creditor, creditors' committee, global  
21 support, AFI pays for third-party releases, everyone is happy,  
22 and the confirmation hearing in front of Your Honor is largely  
23 uncontested.

24 THE COURT: From your lips.

25 MR. MARINUZZI: Let me finish, Your Honor.

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1                   THE COURT: That was route one.

2                   MR. MARINUZZI: Right, but unless creditors adjust  
3 their expectations from what we understand their positions are,  
4 I don't think there's a check big enough for AFI to write to  
5 create scenario one.

6                   Scenario two: we're able to construct a plan that's  
7 supported by the majority of the members of the committee. AFI  
8 writes a check that's somewhere north of 750 million dollars;  
9 it's a number that AFI can defend to its board and treasury.  
10 And we move forward with a slightly contested plan, maybe hotly  
11 contested, but by a small number of participants.

12                  Third scenario: we have no settlement with AFI  
13 whatsoever, can't get creditors to recognize the weaknesses of  
14 their claims or AFI to recognize the strengths of those claims  
15 that are asserted against them, and we simply file a plan that  
16 reserves all of the claims against AFI, the estate's claims,  
17 into a litigation trust. Creditors retain their claims.  
18 Professionals prosecute claims for a number of years. Whether  
19 there's any actual recovery is going to depend on the strength  
20 of the claims; who knows when and who knows how much. I don't  
21 think anybody wants that scenario.

22                  So let's focus on the next sixty days, because what we  
23 really tried to accomplish through this settlement with the  
24 committee is to put pressure on everybody to sit down and  
25 negotiate. We need our creditors and AFI to sit down to try to

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1 get a deal done before the examiner's report is actually filed,  
2 which is two months from now. On the one hand, AFI has the  
3 checkbook. On the other hand, you've got creditors, including  
4 many on the creditors' committees, that have intercreditor  
5 disputes between themselves, claims asserted against the  
6 debtors that are still contingent and unliquidated.

7 And so in order to move the process forward, a number  
8 of things have to happen that are going to require the  
9 cooperation of the creditors' committee. And at this point,  
10 the debtors are actively and acutely focused on dealing with  
11 the creditor claims asserted against them, with the support of  
12 the committee for the first time in the case.

13 We've already commenced an adversary proceeding to get  
14 the Court to address the priority of the securities claims.  
15 There will be more claims objections coming shortly, that are  
16 going to address some of the major issues that are part of the  
17 creditors' committee and part of the dynamics of the asserted  
18 claims of the members.

19 And so when we look at that issue, in order for us to  
20 have progress, people need to be nervous, people need to  
21 understand that there are risks, that they can't sit still. So  
22 we're addressing the creditor's claims, and the agreement we  
23 reached with the committee actually gets them to affirmatively  
24 commit to this process. It's sixty days of negotiation.

25 Now, in agreeing to continue exclusivity for sixty

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1 days, which is an important component of this, we've also  
2 granted the committee -- or agreed that we would not oppose  
3 standing. They'll have to file a motion, they'll have to wait  
4 sixty days to bring an action.

5 Now, AFI obviously recognizes that at some point in  
6 sixty-five days, or whenever that sixty-day period expires,  
7 there's the possibility that litigation will be launched  
8 against it, assuming Your Honor grants the standing motion, and  
9 I suppose we'll hear from AFI eventually when the committee  
10 files its motion.

11 And so AFI has to think hard about whether they want  
12 to sit back and wait for the examiner's report or whether they  
13 want to show up to a mediation. We're encouraged that they'll  
14 show up to a mediation and have a discussion with the committee  
15 and with its members. At the same time, the committee and its  
16 members have to understand, if they actually do go forward with  
17 litigation, what does that do to the dynamics of the  
18 negotiation. So there's risk on both sides.

19 Now, importantly, during this exclusivity period, the  
20 debtors retain the right to file a plan that provides for  
21 releases in favor of AFI, so long as the committee consents.  
22 Now, what does that mean? We don't see it as a veto right.  
23 And -- excuse me, Your Honor. We don't see it as a veto right,  
24 because we think it reflects the reality of these cases, as we  
25 look at the capital structure, we look at the players, we look

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1 at the members of the committee.

2 Scenario A, easy; everybody signs up, it's not an  
3 issue. Scenario C, it doesn't matter; it's going to be a  
4 liquidating plan that's going to reserve all these claims.  
5 It's scenario B, it's the ability to file a plan that has the  
6 agreement of a majority of the members of the committee. And  
7 we think that puts pressure, rightfully so, on the committee  
8 and its members, recognizing that there can be a deal here that  
9 leaves hold-outs out. And we think that puts additional  
10 pressure on them to sit down in mediation and recognize the  
11 weaknesses of their claims, recognize that it's beneficial to  
12 the process for creditors to sit down together and try to  
13 figure out how to address their intercompany issues.

14 AFI, in its filing yesterday, we agree with them.  
15 They recognize, as we do, that to move this case forward, it  
16 isn't simply beating up on AFI; it's also individual committee  
17 members and creditors recognizing that they have to cut their  
18 own deals. And we think this creates the proper balance. To  
19 us, it's not giving up control of the case. To us, it's  
20 recognizing the reality of where we are today and how to move  
21 the case forward.

22 I'm happy to let Mr. Shore speak about his objection  
23 and address anything in particular that he wants to raise with  
24 the Court. If Your Honor has any other specific questions, I'm  
25 happy to answer them.

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1           THE COURT: I -- not so much a question as an  
2 observation. You focused on AFI, and I understand why you did  
3 that; it's been a focus of the committee, it's been the focus  
4 of other creditor constituencies as well. The debtor, in  
5 consultation with the committee, made the decision not to seek  
6 to extend the plan support agreement and settlement with AFI.  
7 It is what it is.

8           One thing you didn't mention in your presentation is  
9 the institutional investors, the RMBS claims, and that process.  
10 Trial has now been rescheduled for May 28th. The proposed  
11 settlement with the RMBS trustees would have an allowed 8.7  
12 billion dollar claim. If that trial -- you know, the sixty-day  
13 exclusivity period will come to an end before the trial. It  
14 may be that the debtors and the settling parties -- I don't  
15 know how to describe them, because it's a settlement with the  
16 RMBS trustees if they sign on to it, otherwise it's not; I  
17 commented before, it's a rather unusual structure for a  
18 settlement. But Mr. Eckstein is certainly taking the position,  
19 with respect to the RMBS settlement, that the committee has  
20 viewed it ought to be a subject for negotiation rather than for  
21 trial. I do consider that to be an important part of the  
22 negotiation -- negotiations, plural, that need to go on during  
23 the next sixty days, assuming exclusivity is extended for that  
24 period.

25           I only raise that because you didn't mention it, and I

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1 can't help -- I've got a room full of boxes of documents that  
2 were exhibits for the trial that was supposed to start in  
3 another week and that now has been put off until May 28th. And  
4 I consider that as a very -- that's an important constituency  
5 and it's an important part of this case. You know, it's  
6 further complicated, because it's not just the trustees who own  
7 the claims, the representation and warrantee claims, but it  
8 raises the whole issue about the monoline insurers.

9 So there are -- you know, Mr. Kruger has his hands  
10 full, because there are a lot of moving pieces to this:  
11 intercreditor claims, claims against various -- the debtors,  
12 and any consensual plan is going to have to resolve those  
13 issues as well.

14 So I just raise the RMBS trustees because it's been --  
15 you know, and I pass by the boxes every day and I've got all  
16 this stuff on my iPad that I read. I just about finished  
17 reading everything that had been filed, to date, for the trial.  
18 So that's a big allowed claim that the debtor has proposed to  
19 grant. So that clearly -- you know, whether the investors like  
20 it or not, it had better be part of the negotiation that takes  
21 place.

22 MR. MARINUZZI: Your Honor, it certainly is the  
23 subject of lots of negotiation. We think it's perfect subject  
24 for intercreditor settlements. We encourage the parties, and  
25 we hope they are -- in fact, we think they are having

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1 settlement discussions, which are helpful, which has allowed us  
2 to move this trial out a little bit.

3 We're sitting down with the committee and its members,  
4 actually, in the event that there is an issue to litigate with  
5 respect to the settlement, to try to narrow the issues that  
6 we'll ask the Court to address. That's actually part of the  
7 global discussions that we're having. And moving the trial is  
8 consistent with our efforts to try a sixty-day period to sit  
9 down and have people negotiate and think about their weaknesses  
10 and really focus on how bad it could be for everybody, at the  
11 end of the day, if we can't get a deal done.

12 Your Honor, I didn't address them because I was  
13 addressing the Court's specific question.

14 THE COURT: Okay. Mr. Shore, do you want to be heard?

15 MR. SHORE: Well, do you want to hear --

16 THE COURT: Come -- you have to come up to the  
17 microphone, sir.

18 MR. SHORE: Do you want to hear from other people in  
19 support of the motion first or --

20 THE COURT: Look, you know, I've ready everybody's  
21 papers. And once the committee and the debtors came to an  
22 agreement on a modified position, you sort of had the last word  
23 with your statement that was filed. So let me hear from you.  
24 I'll let other people speak too, but I think -- you know, I  
25 understood -- understand the points you made, but I do want to

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1 hear you about it. I'm up in the air about it. You have an  
2 important constituency, and any consensual plan is going to  
3 have to resolve the issue of the junior secured noteholders.  
4 Go ahead.

5 MR. SHORE: I have -- by the way, Chris Shore from  
6 White & Case on behalf of the junior secured notes.

7 I have two substantive issues to address, and I'll try  
8 to keep them separate. One is a debtors' extension for sixty  
9 days at all, and the second is the committee-related issues on  
10 the standstill and their veto --

11 THE COURT: Well, let me just --

12 MR. SHORE: -- of our plan.

13 THE COURT: You know, on the issue -- because I will  
14 put this part to rest. On the issue of the debtors' extension  
15 at all, frankly, with Mr. Kruger's appointment as CRO, I'm  
16 going to grant an extension of exclusivity. The reason that  
17 Mr. Kruger -- in my view, the reason Mr. Kruger -- the reason I  
18 approved the retention of the CRO is so that he can actively --  
19 from the debtors' standpoint, actively try and direct, manage,  
20 move a plan process. He deserves a chance to do that. So that  
21 part of it I'm pretty well resolved. You raised a different  
22 issue. That's what I really want to hear about.

23 MR. SHORE: All right. Well, let me, for the record  
24 then, on the issue of extending the debtors' exclusivity,  
25 object on the basis that there's no evidence before the Court.

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1 We've been on the debtors, as to producing evidence of this,  
2 declarations, exhibits, anything to support the statements that  
3 are being made about what they're doing. We have substantial  
4 issues with this notion that -- what they're going to be doing  
5 over the next sixty days. We know nothing about the details of  
6 any meetings, who's going to participate, whether people are  
7 engaging, who's not engaging, what commitments the trustee --  
8 or sorry, the committee has made with respect to negotiating  
9 over the next sixty days, whether or not they're agreeing to  
10 negotiate in good faith, what threats have been made with  
11 respect to a trustee, or anything else. That all goes to the  
12 debtors' extension of exclusivity, and there is no evidence in  
13 the record on an issue which the debtors bear the burden of  
14 proof. They are going forward without any evidence today in  
15 the hopes that Your Honor will extend exclusivity *sua sponte*.  
16 Neither the rules nor the Code permit that, nor does Your  
17 Honor's individual rules in connection with this. They were  
18 required to come forward with evidence today; they haven't done  
19 that.

20 That being said, and preserving that objection, let me  
21 address the issue with respect to the committee and start in a  
22 further away place to talk about deal dynamics, first, to  
23 respond to what Mr. Marinuzzi has said. Second, because I  
24 think that extensions of exclusivities and hearings on it are a  
25 good time to apprise the Court of deal dynamics and what's

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1 going on. And third, I think it will explain our problem with  
2 the bells and whistles the committee has had added to this  
3 which gives them a veto right.

4                   Fundamentally, in each of the three motions for  
5 extending exclusivity the debtors have filed, they have made a  
6 pitch to this Court that this case is complex, the issues are  
7 difficult, and we can't get to a plan. That's not really true  
8 in our view. The allowed capital structure in this case is  
9 fairly simple. There's a billion dollars of bonds up at the  
10 parent that are unsecured. There are 2.4 billion dollars of  
11 unsecured -- or of secured junior secured notes under the Ally,  
12 LLC and DIP claims. There are fifty debtors.

13                   THE COURT: Fifty or fifty-one?

14                   MR. SHORE: I thought it was fifty.

15                   UNIDENTIFIED SPEAKER: Fifty-one.

16                   MR. SHORE: Fifty-one. Fifty-one debtors with claims  
17 asserted by the secured notes throughout, but the unsecured  
18 notes, the only other constituency with material allowed claims  
19 at this point, sit up at the parent. The allowed capital  
20 structure just sets up one debate: how much value flows past  
21 the secured claims, out of the operating companies, up to the  
22 parent, and how much value of parent's litigation claims gets  
23 covered by secured claims or not, the Ally claims.

24                   That's a pretty simple plan. It toggles off of, as I  
25 said, one issue: how much value flows. The committee has

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1 filed a lawsuit saying that our secured claims don't attach to  
2 certain collateral, with the idea that it will flow up, or  
3 maybe it gets eaten up by a deficiency claim. That's a simple  
4 thing.

5 There are two wrinkles here.

6 THE COURT: Ah, were it so simple.

7 MR. SHORE: Well, that's actually a plan that could  
8 get done. If it was just that, I think that's a plan, that  
9 everybody agree, would not be complex. We might be battling,  
10 but everyone would stake out their needs.

11 There are two wrinkles to that. One, we're every day  
12 fixing more of the asset side of the ledger, converting it into  
13 cash, earning treasury rates. On the other side of the ledger,  
14 as Your Honor noted, the expenses --

15 THE COURT: I'm not -- don't count on me approving the  
16 distribution of funds to you -- your clients at this stage,  
17 which is something you --

18 MR. SHORE: No --

19 THE COURT: -- suggested --

20 MR. SHORE: No --

21 MR. SHORE: -- in the --

22 MR. SHORE: -- I'm just -- that's going to be -- if  
23 people want to de-risk, people can de-risk; if people don't  
24 want to de-risk, our view is we're clipping coupons at ten and  
25 five-eighths on 2.4 billion dollars of note claims.

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1           The issue, though, is that the expense side continues  
2 to burn. That's one problem, the one problem we have to fix,  
3 and I think no -- well, let's put it this way, nobody's going  
4 to stand up, and notwithstanding that Your Honor said it as  
5 well, no one would, in the absence of Your Honor saying it, is  
6 going to stand up and say this case deserves to be on a slow  
7 burn. Everybody is in agreement we need to move quickly.

8           The other problem in the case, or the wrinkle to the  
9 case is that it is dominated, in large part, by litigants,  
10 people who do not hold allowed claims. And we're either in a  
11 battle with the debtors in pre-petition lawsuits, or have since  
12 come forward to make a stake to assets of the debtors: the  
13 RMBS litigants, the RMBS trust, the monolines, the securities  
14 plaintiffs. I'm going to add in that the senior notes, because  
15 as a practical matter, senior -- the senior unsecured notes'  
16 distribution is going to be dependent upon litigation  
17 recoveries from Ally and the determination that those are not  
18 subject to a lien. In other words, they are just as interested  
19 in litigating until they get to an allowance of a claim against  
20 Ally that gives them a distribution that satisfies them.

21           So we have, in addition to the ticking time bomb of  
22 expenses, you have litigants out there who are, as Your Honor  
23 knows, and as has been demonstrated in this case, are going to  
24 be as happy -- or are going to be happier with delay than being  
25 forced into a situation in which they either have to settle

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1       their claims or take a chance in post-petition litigation with  
2       fixed reserves there to satisfy their claims.

3           That's the dynamic that this case is in right now,  
4       where you've got people with allowed claims: us, some other  
5       unsecured debt around the enterprise, who have a vested  
6       interest in seeing that the cases move quickly and towards  
7       resolution. And you have another group out there who will  
8       continue to litigate until an issue is put up on the table for  
9       them to either choose a recovery or choose to litigate in  
10      perpetuity.

11           That's the dynamic that sets up, and that's the  
12       problem we have with the committee consent, because that  
13       committee is ultimately -- not just the majority, every single  
14       member of that committee, their recoveries are dependent upon a  
15       lengthy and very complex and very fact-intensive litigation, or  
16       a settlement on their part. That's why we started these cases  
17       out with a plan support agreement and a plan on file, and we  
18       have --

19           THE COURT: I don't -- I never saw a plan.

20           MR. SHORE: Okay.

21           THE COURT: I saw a plan support agreement.

22           MR. SHORE: Well, where they -- where they --

23           THE COURT: I've never, to this day, seen a plan.

24           MR. SHORE: Sorry, with a plan support agreement on  
25       file, very laid out, very detailed terms, exactly what was

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1 going to happen here. We've been pushing for that. And  
2 everybody else in this case -- you don't have another creditor  
3 in front of you with allowed claims at the OpCo level, where  
4 everybody agrees the assets are. You're hearing from people  
5 with contingent litigation claims, and from people whose claims  
6 recovery at the parent is going to be dependent upon litigation  
7 at Ally.

8 So we believe, and we've said it, and I hear Your  
9 Honor on you're going to extend exclusivity, that we are just  
10 going to buy another sixty days when people have -- with free  
11 optionality. And we're going to come back, and now we're going  
12 to say, okay, they've had another sixty days of optionality at  
13 the cost of eighty plus million dollars to the estates; now  
14 we're going to get serious. I may be wrong, and if I'm proven  
15 wrong, I'll be the first to stand up at the next hearing and  
16 say I was wrong, people cut a deal. But our prediction is  
17 we're going to be back here, maybe one or two people have come  
18 into the fold, but we're going to be going ahead with a  
19 contested exclusivity over what kind of plan's going to be  
20 coming out, or at least some very unhappy people as to what  
21 plan is coming out.

22 The problem with the committee consent is that they're  
23 forced here to take inconsistent positions about what's going  
24 on. Let's be clear about what happens, because Mr. Marinuzzi  
25 said one thing but the agreement says another. Mr. Marinuzzi

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1 said that they can withhold consent to any plan with an Ally  
2 release. That's not what their Exhibit A says; that says any  
3 plan. So they had the ability, the committee, which is -- all  
4 the members are either going to have to litigate forever or  
5 agree to some settlement in a highly charged environment where  
6 the clock is ticking. They get the ability to say no to a plan  
7 over the next sixty days.

8 There are four inconsistencies with the committee's  
9 position on that and the debtors' support of that. But first,  
10 the CRO is being appointed because he is independent. If the  
11 CRO finds that, as he's getting up to speed, there is clearly a  
12 plan that can be done that in the exercise of his fiduciary  
13 duties should be put out there immediately, how can the  
14 committee say, on the one hand, he should be independent, but  
15 only as independent as we believe he should be? That's the  
16 first inconsistency.

17 The second inconsistency is, as Your Honor noted, it's  
18 not just that they say the RMBS claims are subject to dispute,  
19 the RMBS claims, they say, could be zero. They're not going to  
20 stand up and state for the record, as a committee member, that  
21 any member of their committee, other than the senior unsecured  
22 notes, has an allowed or an allowable secured claim -- or  
23 allowable claim within the enterprise.

24 So how can they say, on the one hand, that they should  
25 be able to control the process, they should be elevated above

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1 any other constituency in the enterprise to say yes or no to a  
2 plan, when they don't even have a committee with allowed claims  
3 or even allowable claims?

4 THE COURT: So your issue before today -- it may not  
5 have been the only issue, and forgive me if I'm ascribing this  
6 to -- it wasn't the junior secured noteholders alone. I heard  
7 plenty of objections that the debtors' hands were tied by the  
8 pre-petition plan support agreement with Ally, which prevented  
9 the debtor from offering any plan that Ally didn't approve.  
10 And it wasn't -- I mean, you weren't alone in this; that was a  
11 pretty -- the committee was up in arms about it, everybody was  
12 up in arms about it. Okay. So even in your statement, you  
13 express some satisfaction that the plan support agreement has  
14 not been extended.

15 Frankly, my concern, Mr. Shore -- and I'm going to  
16 want to hear from Mr. Eckstein about what veto role -- my term,  
17 not their term -- the committee has going forward. I'm  
18 concerned about a free-for-all. I know you say that plan  
19 alternatives would drive people to consensus and agreement. My  
20 concern is that the plan alternatives you talk about -- and Mr.  
21 Marinuzzi talks about three paths out, and whether it's exactly  
22 the three, whether I would describe the three the same way, I  
23 think that's pretty close to what the alternative paths are at  
24 this point.

25 What -- and my initial comments when you got up, I

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1 mean, I'm most taken by the notion that Mr. Kruger deserves --  
2 and he's been getting up to speed for some time; it's not like  
3 he got approved today and he's going to start looking at stuff  
4 or talking to people now. I gather he's been actively engaged  
5 in that, and I'm assuming he's pretty well up to speed at this  
6 point.

7 I think he deserves an opportunity to see, now that --  
8 and the plan support agreement with Ally may have been  
9 perfectly fine. I know various creditor constituencies were  
10 all up in arms about it. I don't know whether it was good, bad  
11 or indifferent; it's gone now, that's the reality of it.

12 And I think rather than having competing plans come  
13 forward now, with disclosure statement hearings or whatever --  
14 I mean, I'll control the hearing schedule, but I mean, I think  
15 that Mr. Kruger working, and with the continuing tireless  
16 efforts of my colleague Judge Peck, and -- I don't ascribe --  
17 you question there's no evidence of good faith; I want to talk  
18 about evidence in a minute, but I'm not accusing anybody of bad  
19 faith, okay? You've got a constituency, others have  
20 constituencies, everybody's been arguing. The case has got to  
21 get over, or the administrative expenses are going to burn up  
22 everybody's recoveries, but I'm not ascribing bad faith on  
23 anybody's part, including Ally's part, for those who have  
24 suggested that; I don't agree with that. Okay.

25 But I come back to the notion that Mr. Kruger deserves

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1 a chance. Sixty days will be gone before you know it. Yes,  
2 the administrative expenses will continue to burn heavily  
3 during that sixty-day period, but in my mind it's kind of a  
4 balance because the Adelphia test of Judge Gerber, which I've  
5 applied in many cases before; I think they're not necessarily  
6 the exclusive factors, but I think it's a pretty good  
7 cataloguing of the factors the court's supposed to take into  
8 account. I didn't see CRO in that list, but I think you can  
9 fit it under quite a few of the categories. He deserves a  
10 chance to see what he can do.

11 And look, it may be that at the end of sixty days all  
12 bets are off. At that point -- you know, at this stage the  
13 debtor would have an awfully hard time convincing me to extend  
14 exclusivity again at that point. I'm not ruling on it, but  
15 they'd have to show very, very substantial progress. Look, I  
16 mean, from the first motion to extend exclusivity they didn't  
17 get what they wanted, because I was very unhappy with the path  
18 that the case was following. And it's had its fits and starts  
19 going forward.

20 But go ahead and finish up and then I'll want to hear  
21 from Mr. Eckstein, because I think you raise important points.  
22 I'm not enamored of giving any constituency, creditors'  
23 committee -- and you raised in your statement that the  
24 committee's very conflicted, they only have one member who,  
25 what, has a fixed claim at this point. And it may be that

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1 members are conflicted, but I assume they'll act appropriately.

2 But --

3 MR. SHORE: Okay. Let me --

4 THE COURT: -- go ahead, Mr. Shore.

5 MR. SHORE: Sure. Let me address -- I think there  
6 were two things in Your Honor's comments, one on the free-for-  
7 all, and let me touch on the evidence a little bit, and then  
8 this issue of Ally control and the PSA and issues of  
9 independence, which I think is the fourth inconsistency.

10 But first, let me deal with the free-for-all. What  
11 we've been looking for here is engaging by the debtors on real  
12 issues going forward and a real schedule. I would have thought  
13 that, given Your Honor's first comment, much less your second  
14 and -- decision on the second extension, that the debtors would  
15 come in today and say we're meeting with the creditors'  
16 committee on this date, we're meeting with each member on the  
17 following eight days, we're meeting with this, we're doing --  
18 none -- there is no commitment whatsoever --

19 THE COURT: When would you like to meet with Mr.  
20 Kruger?

21 MR. SHORE: Well, we've met with Mr. Kruger. We will  
22 meet when Mr. Kruger wants. And let me address one thing,  
23 because I'm going to get in trouble if I don't mention one  
24 thing. The notion that we are trying to -- and the debtors  
25 keep making this accusation -- take MNPI and be free to trade

1 in anything else, that is a totally unfair characterization of  
2 what's going on. First of all, the debtors have been asking  
3 for nonmarket stuff all along, but second, and most  
4 importantly, we had a hearing, they stood up in front of Your  
5 Honor and said there are going to be issues. We drafted a  
6 multi-page confidentiality order, socialized it with creditors,  
7 took it to the debtors and took it to Judge Peck, and Judge  
8 Peck said, too early, we don't need to address these issues  
9 now, we're still talking about the size of the table and who's  
10 going to sit at the table. When we get to the point where  
11 principals have to be involved -- we're not even to the point  
12 where principals are being involved. When we talk about these  
13 meetings we're still talking about advisors meeting with the  
14 debtors.

15 And with respect to the free-for-all notion, I would  
16 expect the debtors to come in and say who are the people who  
17 could potentially file plans in this period, who have standing  
18 to file plans, or have a realistic possibility of doing  
19 anything other than putting a piece of paper out that people  
20 are going to promptly ignore. There are not that many. I  
21 guess there's an Ally plan, but you can imagine how people are  
22 going to respond to that. There's a JSB plan. There's maybe  
23 an RMBS plan, or one of those plans, but they're going to have  
24 to fight --

25 THE COURT: May I ask you this? Have you given the

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1 debtors and Mr. Eckstein and now Mr. Kruger an outline of a  
2 plan that your constituency will support?

3 MR. SHORE: We have talked about -- well, constituency  
4 will support -- we've talked about plans structures. Quite  
5 frankly, when we get to the committee veto, my view is the  
6 committee's making an end run around that third option, and  
7 this is their way --

8 THE COURT: That's why I just -- I mean, I'm not sure  
9 I got a clear answer. You said you've talked about; have you  
10 actually given the debtors and the committee a plan outline of  
11 what --

12 MR. SHORE: I don't know whether they've gotten the  
13 term sheet. Have they? The debtors have not received a term  
14 sheet. But it has been --

15 THE COURT: So it does -- I mean, it rings a little  
16 hollow when -- I mean, because look, if the debtor got just  
17 pure exclusivity, nothing that the committee negotiated with  
18 them, there'd be absolutely nothing that would stop you from  
19 going to the debtor -- going to Mr. Kruger, now that he's the  
20 CRO, and saying, look, here's the plan outline, the proposed  
21 term sheet of what not only are the ad hoc noteholders prepared  
22 to support, but we believe would garner other creditor support  
23 for the following six reasons.

24 MR. SHORE: Um-hum.

25 THE COURT: Okay? And I would expect that now that

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1 Mr. Kruger is officially in place, you'd go ahead and do that.

2 MR. SHORE: We've had -- we've had the discussion.

3 They know the plan structure; we know the plan structure. The  
4 plan structure is option 3. That has been talked about with  
5 the debtors. That has been talked about with the mediator. My  
6 suspicion is that has been talked about with the committee and  
7 the members of the committee, although we have not had direct  
8 discussions with them over that.

9 I believe that this -- so the question is when do you  
10 go to option 3. Option 3 is everybody's dug in, we're right, I  
11 want a 17 billion dollar claim against Ally, I'm going to fight  
12 for it, and another person says I just want not 8.7 billion  
13 dollars in claims, I want 35 billion dollars in claims. Let's  
14 assume that that's where we are in the process; I have no idea  
15 what people are asking for. The only way you're going to get  
16 people to engage is if option 3 is there. The debtors have  
17 said as much, and they're saying we want another sixty days to  
18 convince people, and when we come down to our thirty day -- I  
19 don't want to argue too much about the thirty --

20 THE COURT: See, but you -- let me just stop you a  
21 second, because until the PSA expired, from the debtors'  
22 standpoint, option 3 wasn't an option. They were committed,  
23 they wouldn't support any plan other than one that passed  
24 muster with Ally. I mean, that was -- am I right on that?

25 MR. SHORE: Well, the debtors never sought approval of

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1 the PSA, so --

2 THE COURT: I --

3 MR. SHORE: -- what the consequences were of their  
4 deciding to file a plan without Ally support is an --

5 THE COURT: Okay.

6 MR. SHORE: -- unanswered issue.

7 THE COURT: All right.

8 MR. SHORE: So --

9 THE COURT: All right. But now they're -- it --

10 MR. SHORE: Now they're free.

11 THE COURT: Now they're free.

12 MR. SHORE: Now they're free. And as we've said in  
13 our papers, that's a good development, as far as getting people  
14 to engage. But I don't want to -- let me --

15 THE COURT: Okay.

16 MR. SHORE: Let me move back from fighting the  
17 debtors' exclusivity. I know when I'm going uphill. And let  
18 me --

19 THE COURT: No, but I -- look, I'll -- the debtors may  
20 not like this. There is no declaration that was submitted in  
21 support of this extension of exclusivity. Mr. Shore has  
22 objected that there is no evidence before the Court and that  
23 the debtors have the burden. That's true; the debtors have the  
24 burden. So if Mr. Shore continues to adhere to that objection,  
25 what I'm probably going to wind up doing is continuing a bridge

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1 order in effect and schedule an evidentiary hearing.

2 Do you really want that, Mr. Shore?

3 MR. SHORE: I --

4 THE COURT: Do you?

5 MR. SHORE: -- want the --

6 THE COURT: Do you?

7 MR. SHORE: -- discipline --

8 THE COURT: I mean, you stood up and you said --

9 MR. SHORE: Yes.

10 THE COURT: -- we object, there's no evidence, they  
11 have the burden. If you want to adhere to that objection I'm  
12 going to set an evidentiary hearing. And if you want to take  
13 discovery, go ahead and take discovery on it. But you know, do  
14 you really want to do that?

15 MR. SHORE: It comes down to -- and let me focus on  
16 the committee's rights with respect to this. If what we're  
17 talking about is a bridge order, for some period of time that  
18 Your Honor deems appropriate, on the existing terms of the  
19 bridge order, which is exclusivity is extended until we have  
20 this hearing, I, quite frankly, think the discipline of having  
21 to deal with discovery and answer the questions with respect to  
22 discovery drives this process forward; it just does.

23 THE COURT: It drives administrative expenses --

24 MR. SHORE: It does. You know, I'm not one to spend a  
25 lot of money on discovery. I think they'll tell you that I've

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1      been fairly focused in what I've been looking for from the  
2      debtors with respect to this. I think, quite frankly, that  
3      that is the right answer here, rather than allowing the debtors  
4      to come in and just, with an evidence-less presentation say,  
5      just trust me for another sixty days. They know what their  
6      burdens are.

7              The committee extension. There were two  
8      inconsistencies. Let me deal with three and four, and let me  
9      deal with the Ally issues and people doing the right thing.  
10     And Your Honor said it; you assume they're going to act in the  
11     right way. You're giving the committee the benefit of the  
12     doubt they're not giving the debtors. The first point in their  
13     RMBS objection is at the time this was negotiated, the officers  
14     of ResCap, LLC, who negotiated this, owed fidelity to Ally and  
15     they couldn't do the right thing. That's their first basis for  
16     you denying the RMBS settlement motion.

17              The STN authority issue, the officers of ResCap are  
18     incapable of suing their parent corporation, and therefore we  
19     have the ability to do it. So fundamentally, they're saying,  
20     when faced with an issue of fidelity to one constituency and  
21     fidelity to another constituency, you've got to get them out of  
22     there.

23              The committee has the same problem. When we talk  
24     about a pot plan, the one that may just get us out quickly,  
25     that may in fact be in the best interests of the estates or

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1 each individual estate; it's not going to be in the best  
2 interest of any of those members. And when you say I assume  
3 they'll do the right thing, they will vote in favor of the pot  
4 plan, because that's the best thing for people with allowed  
5 claims, you're giving a benefit of the doubt that the  
6 committee's not willing to give to the debtors, and is asking  
7 for relief from on the debtors, and will be when they come  
8 forward with the STN motion, saying the debtors are in  
9 conflict. So the problem with the committee's position right  
10 here is --

11 THE COURT: Can I ask you something? Is the debtor in  
12 conflict?

13 MR. SHORE: The debtor in conflict with respect to  
14 Ally?

15 THE COURT: Yes.

16 MR. SHORE: Yes.

17 THE COURT: Okay. So --

18 MR. SHORE: Okay, but that --

19 THE COURT: -- you agree with that.

20 MR. SHORE: Yes, and I agree that -- here's the  
21 problem; the committee is in conflict over option 3. And so to  
22 give them a veto -- if this said what Mr. Marinuzzi said, they  
23 have the ability to withhold consent to any plan with an Ally  
24 release, that's one thing. That addresses that specific  
25 conflict. They're not saying that. They reserve the right to

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1 veto option 3 even if the CRO determines it's in the best  
2 interests of the estates.

3 And let me make one thing clear, and there's a little  
4 language shift. The committee members are estate fiduciaries  
5 in that they are fiduciaries who are appointed by the Court;  
6 they are not fiduciaries to the estate. They are fiduciaries  
7 to the unsecured creditors. And what may be in the best  
8 interests of unsecured creditors is not necessarily what's in  
9 the best interests of the estate. They are not our fiduciary,  
10 and quite frankly, they have no representation on the committee  
11 from the people who are really suffering the admin burn, which  
12 is unsecured creditors at the OpCo level. The assets are down  
13 there, that's where the admin claims are being burned, that's  
14 where the cash is coming from to burn the claims, and that  
15 constituency is not represented. So that's --

16 THE COURT: All right. Let me hear from the  
17 committee, okay?

18 MR. SHORE: Well, let me just put out the fourth  
19 inconsistency, which is we're just here arguing about post-  
20 petition interests. We are here, in our view, arguing about  
21 post-petition interests. The committee, if they're to be  
22 believed in their papers, believes we are in fact the largest  
23 unsecured creditor constituency at the OpCo level. So they  
24 can't, throughout all of this, just take one position that  
25 suits their needs and then come back and take another position.

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1 The fact is there should not be -- whatever extension is  
2 granted, whether under a bridge order or an actual order  
3 extending exclusivity, you can't let the committee have a veto  
4 over any kind of plan that goes forward, because what that does  
5 is that shifts the case. It takes away all those people who  
6 are actually concerned about time and admin burn and gives the  
7 power to the people who, when faced with either crystallizing  
8 their claims at a dollar amount they don't like, or letting  
9 somebody else suffer admin burn, they're going to allow the  
10 people to suffer admin burn.

11 THE COURT: Okay. Mr. Eckstein, let me hear from  
12 you.

13 MR. ECKSTEIN: Your Honor, Kenneth Eckstein of Kramer  
14 Levin on behalf of the creditors' committee.

15 I always enjoy listening to Mr. Shore because he's  
16 eloquent, but I interpreted his --

17 THE COURT: He is right; there is no evidence. I  
18 mean, I --

19 MR. ECKSTEIN: I guess there's no formal witness or  
20 declaration --

21 THE COURT: Well, that's what we call evidence.

22 MR. ECKSTEIN: -- so to that extent, I can't quarrel  
23 with that. But I sort of interpreted Mr. Shore's  
24 presentation --

25 THE COURT: Well, I don't know whether he's serious

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1 about the evidence; you know, he says he is, okay, and I'll --

2 MR. ECKSTEIN: Well, I'll get to that in a moment,  
3 because I --

4 THE COURT: I mean, his real gripe is he doesn't want  
5 to give the committee veto. You say it's not veto, it's  
6 something else. But --

7 MR. ECKSTEIN: And I think Mr. Shore knows that  
8 he's -- that he's not giving the committee a veto, and that's  
9 not really the point. I sort of interpreted Mr. Shore's  
10 presentation, essentially, as a lengthy motion to join the  
11 creditors' committee, which I think is what he really wants to  
12 do. But maybe that's left for another day, if he believes he's  
13 the largest unsecured creditor of this estate, which he may  
14 well be.

15 But the fact of the matter is -- and there are a lot  
16 of points that I'll try to get through fairly succinctly -- the  
17 agreement that the committee reached with the debtor, I  
18 thought, and I think, Your Honor, is actually a very  
19 constructive step that we were able to take in the case. And  
20 it was really designed to take the temperature down and to  
21 hopefully let this case proceed in as constructive a manner as  
22 possible. And I think Your Honor put your finger on it when  
23 you said the arrangement between the committee and the debtor  
24 was designed to try to avoid a free-for-all. And that was  
25 really the goal of the committee and the debtor over the next

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1 sixty days, was to essentially say if we can get to a  
2 consensual plan, let's file a consensual plan.

3           But given the fact that we're talking about a short  
4 window of time, the goal was not to have Mr. Kruger or the  
5 debtor turning around a week or two after the CRO was put in  
6 place and all of a sudden have the debtor filing nonconsensual  
7 plans or alternatively, if exclusivity was going to be  
8 terminated, which was something that was being seriously  
9 considered, to potentially have three or four different plans  
10 coming out at a time when Mr. Kruger was really going to try to  
11 see if he could accomplish something. Sixty days is a short  
12 amount of time.

13           The fact of the matter is, notwithstanding the  
14 presentation, again, from Mr. Shore, we all know this case was  
15 driven by the RMBS-related liabilities. There are financial  
16 liabilities in this case, and they're important, and they have  
17 real interests in this case. But we can't forget the fact that  
18 when the case began, Mr. Shore's constituency signed a plan  
19 support agreement that they were comfortable in agreeing to  
20 because it paid them in full. And there was never any mistake  
21 about that.

22           They signed one of the PSAs in this case. The other  
23 PSA was signed by the RMBS investors. The other PSA was signed  
24 by AFI. Each of them were satisfied with what was being  
25 obtained for their constituencies. And that's fine, but

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1 that -- the problem in the case was always the fact that we had  
2 constituencies that were in the tent and constituencies that  
3 are out of the tent. And the challenge of this case right now  
4 in particular, is to see whether or not we can expand the tent  
5 sufficiently broadly to ultimately get everybody into the tent.

6 Before getting back to the discrete issue of the sixty  
7 days, which I frankly do not think is the dog, it's really the  
8 tail her, the real issue I want to get to is some of the  
9 comments Mr. Marinuzzi made, which I largely agree with,  
10 although I take one exception which I think is important.

11 He laid out three options. And the first option was  
12 whether or not we could get global consensus and have peace in  
13 our time. And that may or may not be attainable. And I  
14 recognize that it may not be attainable and it may be  
15 aspirational. The fact of the matter is, and one of the  
16 reasons why it's important to create another window right now  
17 to let this process play out, is that the mediation that was  
18 put in place was constructive. And in fact, parties had  
19 engaged.

20 And there was -- it was taken seriously by the  
21 creditors, the committee and its members, and it was taken  
22 seriously by AFI. The fact of the matter is, the mediation  
23 process was not come to -- was not something that we came to  
24 casually. There were extensive meetings between the creditors'  
25 committee and AFI, one-on-one, where there was in-depth,

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1 substantive exchanges of views on potential legal claims. The  
2 committee made presentations; AFI made presentations. There  
3 were extensive discussions with the mediator, and I know that  
4 those discussions are continuing today, even after the order,  
5 even after the February 28th period had run, before the order  
6 was extended. Judge Peck has been continuing. I spoke to  
7 Judge Peck yesterday. And I know that he has discussions on a  
8 daily basis, that are substantive, with many parties.

9 And while that may not be evidenced, the fact of the  
10 matter is, I believe that Judge Peck's role in this case is  
11 reflective of significant progress that has been made toward a  
12 plan. There is no question. Progress has been made in this  
13 case. And if we had to put on evidence, I have no doubt that  
14 that's what the evidence would show. And I don't believe  
15 anybody in this room, neither the committee nor AFI, would  
16 disagree.

17 There is one question that has not been answered, and  
18 it's out there, and I struggle with it. And that is, whether  
19 or not a plan can be achieved prior to the publishing of the  
20 examiner report. And candidly, Your Honor, I believe that is  
21 the single biggest hurdle that we are confronting right now is,  
22 can the parties bridge their differences before the examiner's  
23 report comes out. And that's where I take some exception to  
24 what Mr. Marinuzzi said.

25 It may be that the answer is no. It may be that we

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1 just have to wait for the examiner's report. It's not simply  
2 that people have to get realistic or not realistic, because  
3 there was a real substantive exchange of views between AFI and  
4 the committee. And AFI wants to pay less and the committee  
5 wants them to pay more. And people had different views on the  
6 claims. And that's not unusual.

7 But the fact of the matter is, the examiner's report  
8 is significant. It's not coming out until May. And  
9 notwithstanding good-faith efforts by the parties, it may turn  
10 out that we won't be able to get to a plan until the examiner's  
11 report comes out. I personally had been hopeful that we were  
12 going to be able to cut through it and try to get to a point  
13 where the parties were going to figure out whether or not they  
14 could bridge the differences.

15 THE COURT: Frequently uncertainty is a strong element  
16 of reaching agreement.

17 MR. ECKSTEIN: I agree.

18 THE COURT: And the examiner's report is a great  
19 question mark, uncertainty. And the parties will either reach  
20 an agreement before or not, but it may well change a lot when  
21 that happens.

22 MR. ECKSTEIN: And, Your Honor, that's precisely why  
23 we all agreed to construct essentially an additional sixty-day  
24 window where parties did not have to prematurely commit  
25 themselves to positions. Whether it's option 2 or option 3,

1 those are all litigation options. We may have to get there.  
2 But we specifically agreed with the debtor that with the  
3 introduction of Mr. Kruger it made sense to continue Judge  
4 Peck. And while we go down the path of seeing how we resolve  
5 these difficult intercreditor allocation issues and the  
6 disputes relating to the claims, which like it or not, include  
7 disputes relating to the JSB claims. Mr. Shore may not  
8 appreciate it, but the fact of the matter is, there is a  
9 complaint out there that raises serious questions about the  
10 extent of their collateral. There are serious questions about  
11 allocation of the estates' expenses going forward and the  
12 extent to which those expenses will be borne by the JSBs, in  
13 whole or in part. And there is this continuing mantra of  
14 they're entitled to post-petition interest.

15 THE COURT: What is it -- those issues remain.

16 MR. ECKSTEIN: Those are out there.

17 THE COURT: You'll either settle them or you won't.

18 MR. ECKSTEIN: Right.

19 THE COURT: You'll litigate them. But that's -- okay.

20 But specifically address the settlement, if you will,  
21 on exclusivity, between the committee and the debtors, with  
22 respect to -- and I read it as essentially a veto. They can't  
23 propose any plan that the committee doesn't agree with for the  
24 sixty-day period.

25 MR. ECKSTEIN: That -- and it was simply that, Your

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1 Honor. It was that for the sixty-day period -- we all know,  
2 there is no plan that's out there yet. And Mr. Shore conceded  
3 it. He hasn't even circulated it.

4 THE COURT: I understand that.

5 MR. ECKSTEIN: Nobody has a plan, yet.

6 THE COURT: But I mean, I --

7 MR. ECKSTEIN: The --

8 THE COURT: -- but I don't -- what Mr. Shore has  
9 objected to -- he's objected to a couple of things, but one of  
10 the things that he most seems to object to is that the  
11 committee is given a veto over any plan that the debtors would  
12 propose in the next sixty days.

13 MR. ECKSTEIN: Your Honor, I don't believe it's  
14 structured as a veto. That's not --

15 THE COURT: It is, I mean --

16 MR. ECKSTEIN: -- but that's not the idea.

17 THE COURT: -- they can't -- they agree, they will not  
18 propose a plan that the committee doesn't support in the next  
19 sixty days. That sounds like a veto to me.

20 MR. ECKSTEIN: I think -- but I think in substance,  
21 the agreement is that a nonconsensual plan in this case is not  
22 being filed in the next sixty days. I think that was the  
23 agreement. And if you want -- to call it a veto, I think is a  
24 negative way to characterize it.

25 THE COURT: Well, consensual with whom? Consensual

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1 just with the committee?

2 MR. ECKSTEIN: The way we articulated it was the  
3 committee. And we understand, from Mr. Shore's standpoint, he  
4 simply wants to be paid in full. He's presuming he's going to  
5 get paid in full. And I understand his interest in he doesn't  
6 want -- he wants to make sure that the plan ultimately reflects  
7 his views, and by definition, Mr. Shore is at the table. His  
8 constituency will be at the table, and everybody understands  
9 what is needed in order to propose a plan that is satisfactory  
10 or not satisfactory to the JSBs.

11 But the goal is -- notwithstanding Mr. Shore's  
12 parochial concerns, the goal was, over the next sixty days, to  
13 avoid a nonconsensual plan process. That was the goal. It was  
14 very simple. Avoid a nonconsensual plan process. And if there  
15 is --

16 THE COURT: What you've come up with, it isn't that  
17 you avoid a nonconsensual plan process, it's that you avoid the  
18 debtor proposing any plan that isn't acceptable to the  
19 committee. There are many other constituencies: Mr. Shore's  
20 constituency, others in this courtroom. There's nothing in  
21 what you've agreed -- that you've proposed that said the only  
22 thing that will be proposed is a consensual plan. It's  
23 something that we agree with or nothing.

24 MR. ECKSTEIN: Well, we tried to avoid the notion of  
25 saying consensual with everybody in the case, because that, at

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1 some point, becomes almost impossible.

2 THE COURT: Right.

3 MR. ECKSTEIN: The fact of the matter is, there aren't  
4 that many constituencies outside of the committee in this case.  
5 There's the JSBs, there's AFI, and then the rest of the  
6 constituencies are all sitting on the committee. I understand  
7 that the committee has its challenges, because it has many  
8 conflicting constituencies. But because all of the  
9 constituencies are represented within the committee roof, the  
10 notion of using the committee, at least, as a fulcrum to  
11 achieve what has the best context for a consensual plan was  
12 viewed as a way to minimize the risk of sort of disarray over  
13 the next sixty days and focus people on trying to get something  
14 in place that is productive.

15 We recognize the fact -- we may make progress over the  
16 next thirty days, and we may get to a point where a majority of  
17 the committee and the debtor are prepared to support a plan.  
18 And this arrangement contemplates that that plan can be filed.  
19 As a practical matter, I think Your Honor knows, in a case like  
20 this, whether or not realistically, even if we can strike a  
21 business deal in the next thirty days, will a plan and a  
22 disclosure statement really be ready to be filed in sixty days?  
23 My experience tells me no.

24 And so I think it's somewhat academic what we're  
25 debating about. This is all directional.

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1           THE COURT: So don't debate over academic issues,  
2 then. If that's -- if you agree that this is essentially  
3 academic --

4           MR. ECKSTEIN: Your Honor, this is -- this arrangement  
5 was a construct to achieve confidence. And that's what this --  
6 this was a confidence structure, and it was very successful.  
7 It got everybody basically to cool down the tempers and focus  
8 on how do we make progress.

9           THE COURT: Not everybody.

10          MR. ECKSTEIN: Well, Your Honor, I understand, because  
11 Mr. Shore essentially would like to persuade the debtor to  
12 propose option 3. We're not opposed to the prospects of option  
13 3. In fact, I think by take -- we took a pretty dramatic step  
14 by saying the PSA should be terminated and the debtor consented  
15 to a motion that the committee will file with respect to STN  
16 relief. That is essentially option 3. We agreed with the  
17 debtor that no litigation is going to be commenced in the next  
18 sixty days --

19          THE COURT: All right.

20          MR. ECKSTEIN: -- because we wanted to try to maintain  
21 the cool-down.

22          THE COURT: Let me -- let me hear from Mr. Wofford.  
23 Do you want -- he's standing to --

24          MR. ECKSTEIN: Yes, Your Honor.

25          MR. MOLONEY: Your Honor, can I be heard?

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1           THE COURT: Yes, come on up, Mr. Moloney.

2           Mr. Wofford was popping up and down for a while, so,  
3 I'll let you speak next, okay?

4           MR. WOFFORD: Your Honor, I'll be brief. For the  
5 record, Keith Wofford from Ropes & Gray on behalf of the RMBS  
6 steering committee.

7           Look, Your Honor, initially our group had looked at  
8 this compromise that was made between the committee and the  
9 debtors as potentially benign. But having heard more about it  
10 on the record, we're very concerned about the veto. Let me  
11 give you our view of this.

12           THE COURT: I never should have used that word "veto".  
13 It's not written in there.

14           MR. WOFFORD: Well, it's appropriate, because Exhibit  
15 A says what it says. It says that the newly appointed  
16 independent fiduciary of the debtors cannot --

17           THE COURT: But you know what, Mr. Wofford, as a  
18 practical matter, it makes zero difference in this case.  
19 That's the reality of it. It makes zero difference. But go  
20 ahead.

21           MR. WOFFORD: I think I would agree with your earlier  
22 view, that if it really doesn't make any difference, maybe it's  
23 better if we just avoid having discovery and further estate  
24 resource burn about basically an issue of evidence that isn't  
25 really the issue, and just have everyone agree to take it out.

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1           THE COURT: Go ahead. What else did you want to say?

2           MR. WOFFORD: Sure. Look, we believe that the  
3 administrative burn hurts our constituents most in this case.  
4 And we believe that this window before the examiner's report  
5 coming out is something that could be helpful. And to fetter  
6 that window with this, again, veto right, is potentially  
7 problematic, because we understand that that examiner's report  
8 could make the causes of action against Ally look better --

9           THE COURT: Or worse.

10          MR. WOFFORD: -- or it could make the causes of action  
11 look --

12          THE COURT: Or worse.

13          MR. WOFFORD: -- worse. And our constituency cut a  
14 deal because frankly, we believe that there is that bundling  
15 and that array of risks. And frankly, to the extent there are  
16 other parties that agree that they would like to, along with  
17 the debtors and their independent fiduciaries, pursue a plan  
18 that would reach some acceptable level before that report comes  
19 out, that that option should be available without necessarily  
20 having a veto over it.

21          THE COURT: All right. Thank you, Mr. Wofford.

22          Mr. Moloney, do you want to be heard?

23          MR. MOLONEY: Thank you, Your Honor. I'll be very  
24 brief, Your Honor. Tom Moloney on behalf of Wilmington Trust.  
25 We're special counsel. And I've very happy that we're

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1 recognized that we actually are a creditor.

2 Just on the evidentiary point, Your Honor, I think  
3 there are a couple matters as to which Your Honor could take  
4 judicial notice today. And I think that there's no question  
5 about them. One is that no plan can be filed within the next  
6 sixty days, or at least in the short term, there's no plan  
7 before you. I think you have a consensus about that. I think  
8 you can take judicial notice that we have a brand new CRO.

9 THE COURT: So Mr. Shore could turn around tomorrow  
10 and file a plan. I mean, it's a pretty simple construct --

11 MR. MOLONEY: Well, yes ,but --

12 THE COURT: -- of what he's talking about.

13 MR. MOLONEY: Well, he hasn't given in a term sheet  
14 yet. I think you can take judicial notice of that. I think  
15 you can take judicial notice of the fact that the CRO's been  
16 appointed. Judicial notice of the support by the committee and  
17 significant creditor groups, such as the trustee for the  
18 bondholders. And you could take judicial notice of the sales.

19 So if Your Honor -- there is some evidence here by  
20 way -- that supports the proffer effectively, that was made in  
21 terms of these four items which I think you could take judicial  
22 notice of.

23 The second -- the main reason I stood up, though, is  
24 to kind of explain to you -- I think you understand -- but just  
25 exactly what the deal is that was reached between the

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1 committee, which our client is the co-chair, and the debtors,  
2 that's in place here. We had an arrangement with the debtors,  
3 Wilmington Trust individually, and the committee as well, that  
4 we would be involved in any selection of a CRO. That was  
5 breached outright. And I have no quarrel with Mr. Kruger.  
6 I've known him for over thirty-five years. I think he's an  
7 excellent addition to the case as a person. But he was chosen  
8 in breach of the agreement.

9 We then had two options. One simply would be to  
10 appoint a trustee, which frankly, maybe would have been the  
11 best option at the very beginning. However, as Your Honor  
12 started out by talking about the amount of administrative  
13 expense in this case, that clearly seemed to be a very  
14 unpalatable option. So that option was not an option.

15 The second question is well, how will we work with Mr.  
16 Kruger, given he's already been appointed in violation of our  
17 agreement? He's going to have to build some trust. Okay,  
18 we'll give him a window of time to build trust. And during  
19 that window of time, we're not prepared for option 3 you heard  
20 about, Armageddon, to go forward.

21 So we're essentially, as a practical matter, taking  
22 option 3 off the table, because the committee does represent a  
23 wide --

24 THE COURT: So, look, you know --

25 MR. MOLONEY: -- constituency.

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1           THE COURT: -- sixty-one days after -- if this order  
2 were to get entered, sixty-one days after it, Armageddon could  
3 strike.

4           MR. MOLONEY: Correct.

5           THE COURT: And that's just --

6           MR. MOLONEY: And there's one other aspect to this,  
7 Your Honor, that Mr. Shore was not correct about either in his  
8 pleading or what he said, which is that Wilmington Trust did  
9 file claims against every single debtor entity, and the  
10 possibility of substantive consolidation or some variant on  
11 substantive consolidation is also another one of the 1 to 3, or  
12 1(a), 2(a), 3(a) possibilities here.

13           So, Your Honor, I think that going forward with the  
14 deal we struck, which I think was a reasonable accommodation,  
15 given our doubts about -- our need to develop some trust in the  
16 debtor and in a brand new fiduciary; the fact that we were  
17 agreeing not to go forward and file litigation and not to go  
18 forward and file committee plans, which would be the other  
19 option. You look at -- they said they violated the deal on the  
20 CRO. Your options are 1) trustee, doesn't seem too palatable;  
21 file our own plan -- that means we're going right down that  
22 road; or option 3 is we file a lawsuit right now, a motion and  
23 file a lawsuit while -- we tried to pick a middle ground that  
24 made sense, I think, in terms of where we were.

25           And as most compromises, it's not perfect. But there

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1 is a logic to it, and that's how we got there.

2 THE COURT: Thank you, Mr. Moloney. Who else wants to  
3 be heard? Anybody else before Mr. Marinuzzi? You want to say  
4 something else very briefly, Mr. Shore?

5 MR. SHORE: Yes.

6 THE COURT: Very briefly. Come on up.

7 MR. SHORE: Let me just make three points. That kind  
8 of statement that's being made is exactly what we want  
9 discovery on. If there are threats of a trustee out there or  
10 anything else, we want to know about that, because that's --

11 THE COURT: Look, if anybody wants to threaten tru --  
12 you know?

13 MR. SHORE: Okay. I agree.

14 THE COURT: Don't waste your time. I'm just -- go  
15 ahead.

16 MR. SHORE: With respect to the committee, the  
17 statement was made that everybody's represented on the  
18 committee; that's a proxy. That's exactly what I'm saying.  
19 They're not a proxy for any holder of allowed claim who's  
20 feeling the pain.

21 THE COURT: You know, these -- you made these points  
22 already.

23 MR. SHORE: Okay. Second with respect --

24 THE COURT: Do you have something --

25 MR. SHORE: Yes. With respect to the procedural

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1 objection, we object to entry of exclusivity on the proposed  
2 order on the basis that there's no evidence. We do not object  
3 to an extension of the bridge order for sixty days on --

4 THE COURT: That isn't happening.

5 MR. SHORE: -- the existing terms.

6 THE COURT: So if that -- I'm not extending the bridge  
7 order for sixty days. Okay?

8 MR. SHORE: Okay. Then we have the objection to the  
9 extension --

10 THE COURT: Okay.

11 MR. SHORE: -- of exclusivity.

12 THE COURT: All right. Mr. Marinuzzi?

13 MR. MARINUZZI: Your Honor, just briefly. I don't  
14 quite understand the distinction between extending exclusivity  
15 through a new order today for sixty days and a bridge order for  
16 sixty days and what the evidentiary --

17 THE COURT: The difference is that the bridge order  
18 doesn't give the committee a veto. It means if in the next  
19 sixty days the debtors and Mr. Kruger want to file a plan, they  
20 can go ahead and do that. That's the difference.

21 MR. MARINUZZI: Okay, Your Honor, I don't believe that  
22 entry of an order -- we have a deal. Right? And, Your Honor,  
23 you referred to it as veto rights, but just so the Court is  
24 clear --

25 THE COURT: It is. It is veto rights.

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1                   MR. MARINUZZI: But in some respects, it's a  
2 continuation of the arrangement that we had in connection with  
3 our prior extensions of exclusivity. And let me refresh  
4 everyone's recollection, because this isn't a secret. The  
5 committee's statement in support of our request for exclusivity  
6 the last round said, "The committee understands that the  
7 debtors will not file a Chapter 11 plan during the extended  
8 exclusive period without the support of the committee." That's  
9 what we negotiated the last time. This is not new. This is  
10 just continuing the same arrangement going forward.

11                  Now, let me respond to a couple of points that Mr.  
12 Shore raised. On evidence, we agree with Mr. Moloney. We  
13 think under RFE 201, Your Honor could take judicial notice of  
14 the record and orders that the Court's already entered.

15                  THE COURT: Okay. Let me -- Mr. Marinuzzi? In light  
16 of Mr. Shore's objection, this is a contested matter. Under  
17 our local rules, 9014 -- and I don't know whether it's -1  
18 or -2, the first hearing in a contested matter isn't an  
19 evidentiary hearing unless the Court has ordered it in advance.  
20 Okay? If Mr. Shore wants to stand on that objection, okay.

21                  The one thing you all better know by now is, I follow  
22 the rules. Okay? I'm not going -- I mean, he wants to stand  
23 on it, fine. He'll stand on it. It isn't going to be a sixty-  
24 day bridge order. I'll tell you right now, what I'm doing is  
25 I'm scheduling -- I'm continuing the bridge order in effect and

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1 scheduling a hearing on the motion to extend exclusivity for 10  
2 a.m. Tuesday, March 19th. No discovery. Bring your witnesses.  
3 They can do it the old-fashioned way, and they can seek to  
4 cross-examine.

5 The only thing I will require is if the parties -- and  
6 the only objection to exclusivity remains, is Mr. Shore. Mr.  
7 Shore, if he intends to call any witnesses, what he -- well,  
8 two things. By a week from today, March 12th, at 5 o'clock,  
9 the debtors will submit any declarations in support of their  
10 motion, including any exhibits, authenticated. And Mr. Shore,  
11 that same -- you'll do it simultaneous. If there's any  
12 evidence he wishes to introduce in opposition, as part of his  
13 affirmative case, he'll have declarations at the same time.

14 Obviously he'll have the right to cross-examine any of  
15 the declarants. And if he intends to call anybody other than  
16 declarants, he needs to notify you by -- the two of you ought  
17 to confer so you know exactly who the declarants are going to  
18 be, and if he's going to call anybody, bring them on. Okay?

19 We were supposed to have a trial that week. That date  
20 is available. I think you're all wasting a lot of time. But  
21 it's a contested matter. There were no -- you know, all you  
22 had to do was put in a declaration in support, and maybe I  
23 would have dealt with this. Okay? But you didn't do that.

24 MR. MARINUZZI: We apologize in --

25 THE COURT: So we'll do it the hard way. Okay.

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1           All right, you can go forward on the basis of your  
2 proposed order, if that's what you choose to do. I'm still --  
3 I'm not indicating how I'll rule. I don't know how I'll rule  
4 on it. I'm -- Mr. Shore's argument has some traction, not  
5 complete, over this issue of whether -- I mean, I really do  
6 think this is much ado about nothing, because I think in sixty  
7 days it would be a miracle if there was a disclosure statement  
8 and a plan filed. So I think, as a practical matter, I don't  
9 think this makes any difference whatsoever.

10           MR. MARINUZZI: Your Honor --

11           THE COURT: I think that it was described as a  
12 confidence-building step. Find your confidence another way.  
13 Okay? Have some trust that Mr. Kruger is going to act as an  
14 independent fiduciary in terms of any plan. I mean, Mr.  
15 Eckstein, sixty-one days from the entry of an order, if Mr.  
16 Kruger decided that the debtor's going to file option 3 plan,  
17 that's what they'll do. I mean, sixty days is going to -- for  
18 better or worse, is going to be here before you all know it.  
19 Okay? I'm very mindful of that.

20           If somehow after we break today you can resolve these  
21 issues, please do that. If I -- in the Court's view, the only  
22 remaining objection is Mr. Shore's objection on behalf of the  
23 ad hoc junior secured noteholders. If that issue is resolved,  
24 and you submit a consensual order that would extend exclusivity  
25 to the dates that this current motion would do, as modified,

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1 the Court will enter it and cancel the hearing. Otherwise  
2 we'll go forward with an evidentiary hearing on the 19th.

3 So on the record, the bridge order is extended on the  
4 same terms until the conclusion of a hearing that will begin on  
5 May (sic) 19th.

6 UNIDENTIFIED SPEAKER: March.

7 THE COURT: March 19th, excuse me. Thank you. March  
8 19th.

9 MR. MARINUZZI: Thank you, Your Honor.

10 THE COURT: Okay.

11 MR. MARINUZZI: One additional point. We've got some  
12 time between now and then. We're hopeful that the time is used  
13 by the ad hoc committee to share with Mr. Kruger, since he's  
14 asked for it, information regarding their claim. We really  
15 would like to talk to them about what --

16 THE COURT: Mr. Kruger, when would you like to meet  
17 with Mr. Shore?

18 MR. KRUGER: Well, I called, I guess, Mr. Uzzi --

19 THE COURT: Okay, I see he's in the back. When would  
20 you like to meet with Mr. Uzzi?

21 MR. KRUGER: Whenever they're ready.

22 THE COURT: No, when are you ready?

23 MR. KRUGER: I'm ready now.

24 THE COURT: Mr. Uzzi, when would you like to meet --

25 MR. UZZI: Your Honor, right now --

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1           THE COURT: Just identify yourself.

2           MR. UZZI: I'm sorry, Gerard Uzzi of Milbank on be --  
3 Milbank Tweed, on behalf of the ad hoc committee.

4           We have a financial advisor, Houlihan, who has a  
5 model. The debtors have a financial advisor, FTI, who has a  
6 model. They are in the process of making sure they reconcile  
7 that model so that there's no disagreement on the math.

8           We don't think that there is, and we're a little bit  
9 surprised to hear that there's apparent misunderstanding. We  
10 exp --

11           THE COURT: Actually, it was a fairly simple question.

12           MR. UZZI: -- we expect that to -- well, Your Honor, I  
13 just wanted --

14           THE COURT: It really was a simple question.

15           MR. UZZI: Well, our conversation last night was that  
16 we will -- we will make sure we don't have a disagreement on  
17 the math this week --

18           THE COURT: When will you resolve that?

19           MR. UZZI: -- this week, and meet early next week.

20           THE COURT: Mr. Kruger, are you available early next  
21 week?

22           MR. KRUGER: Yes, I am, Your Honor.

23           THE COURT: Okay, so meet early next week.

24           MR. UZZI: We will, Your Honor. We look forward to  
25 it.

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1                   THE COURT: Okay. Thank you very much.

2                   MR. MARINUZZI: Your Honor, the next item on the  
3 agenda is on page 10 under "Adversary Proceedings". And this  
4 is the Sealink Funding adversary proceeding motion to remand.

5                   THE COURT: Yes.

6                   MR. MARINUZZI: We're not a party to the proceeding.

7                   THE COURT: I know.

8                   MR. MARINUZZI: We'll cede the podium to counsel for  
9 Sealink.

10                  THE COURT: Okay. Let me say, this is the last thing  
11 on the agenda for today, right?

12                  MR. MARINUZZI: Yes, it is, Your Honor.

13                  THE COURT: So what we're going to do is we're going  
14 to take a ten-minute recess. Everybody else is excused who  
15 doesn't need to be here for this. Okay?

16                  MR. MARINUZZI: Thank you, Your Honor.

17                  (Recess from 11:30 a.m. until 11:45 a.m.)

18                  THE COURT: Please be seated. Mr. Marinuzzi?

19                  MR. MARINUZZI: Your Honor, for the record, Lorenzo  
20 Marinuzzi, Morrison & Foerster, on behalf of the debtors again.

21                  No surprise, Your Honor. When we broke, we actually  
22 were able to have some productive discussions without the  
23 assistance of a mediator, and we were able to resolve our  
24 disputes --

25                  THE COURT: If it took a mediator on this one, then

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1 you'd really be in trouble.

2 MR. MARINUZZI: Right, then we'd have big problems.  
3 And we were able to resolve the objection of the ad hoc  
4 committee by reading into the record certain language. I just  
5 want to note that the order that's being presented for the  
6 Court doesn't incorporate or mention the settlement that's  
7 attached to the committee's filing. It's a plain vanilla order  
8 that simply has the continuation of the periods.

9 The debtors presently have no intention of filing a  
10 plan without the consent of the UCC. Notwithstanding any  
11 commitments the debtor has made with respect to exclusivity,  
12 the debtors reserve the right, in the exercise of their  
13 fiduciary duties, to file a plan without the consent of the UCC  
14 during the exclusive period.

15 I wanted to make that clarification for the record.  
16 It satisfies the concerns of the ad hoc committee, and it's  
17 satisfactory to the committee and the debtors.

18 THE COURT: Mr. Shore, with that addition, do you  
19 withdraw your objection?

20 MR. SHORE: Yes, Your Honor.

21 THE COURT: Anybody else want to be heard?

22 All right. The motion to extend exclusivity is  
23 granted.

24 MR. MARINUZZI: Thank you, Your Honor.

25 THE COURT: Thank you.

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1                   MR. MARINUZZI: May we be excused, Your Honor.

2                   THE COURT: Yes, you may.

3                   MR. MARINUZZI: Thank you.

4                   THE COURT: Absolutely.

5                   MR. SHORE: Thank you, Your Honor.

6                   THE COURT: All right, we're going to move now to  
7 Sealink Funding Ltd. v. Deutsche Bank AG. It's adversary  
8 proceeding number 12-02051.

9                   UNIDENTIFIED SPEAKER: Your Honor, could we be  
10 excused?

11                  THE COURT: Yes, please.

12                  UNIDENTIFIED SPEAKER: Thank you, Your Honor.

13                  THE COURT: Thank you for working it out.

14                  (Pause)

15                  THE COURT: All right, let me have the appearances,  
16 please.

17                  MS. BOON: Good morning, Your Honor. Rebecca Boon  
18 with Bernstein Litowitz on behalf of plaintiff Sealink Funding  
19 Ltd.

20                  MR. WOLL: Good morning, Your Honor. David Woll of  
21 Simpson Thacher & Bartlett on behalf of the Deutsche Bank  
22 defendants. And with me is Isaac Rethy.

23                  THE COURT: Thank you.

24                  MR. WALES: Good morning, Your Honor. David Wales  
25 also on behalf of the plaintiffs.

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1                   THE COURT: Good morning. Ms. Boon, you're going to  
2 argue?

3                   MS. BOON: Yes.

4                   THE COURT: Go ahead.

5                   MS. BOON: Good morning, Your Honor. Rebecca Boon  
6 with David Wales for plaintiff, Sealink Funding Ltd. On  
7 Sealink's motion to remand.

8                   As is clear from the parties' papers, Your Honor,  
9 we're here this morning on more of the same. Again, we have  
10 fraud claims against Deutsche Bank. We have no originator  
11 defendants, no debtors defendants, no affiliates of the debtors  
12 are defendants. Sealink currently has six RMBS cases pending  
13 in the Commercial Division. Most of those are before Judge  
14 Bransten. Two of Sealink's RMBS cases have already been  
15 remanded by Judge Swain. And there, Judge --

16                   THE COURT: I'm sorry, how many?

17                   MS. BOON: Two of Sealink's RMBS cases have been  
18 remanded by Judge Swain.

19                   THE COURT: On what basis were they removed?

20                   MS. BOON: Judge Swain --

21                   THE COURT: 1334?

22                   MS. BOON: -- I'm sorry?

23                   THE COURT: What was the basis for removal?

24                   MS. BOON: Yes, 1334.

25                   THE COURT: And did Judge Swain write an opinion?

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1 MS. BOON: She did, Your Honor.

2 THE COURT: Do I have that?

3 MS. BOON: You do.

4 THE COURT: Okay.

5 MS. BOON: You do.

6 THE COURT: That I haven't read. I've read lots of  
7 stuff, but that I haven't read.

8 MS. BOON: Basically, Your Honor, she concluded there  
9 was no related-to jurisdiction, because there were no timely  
10 filed proofs of claim. But then she took care to go through  
11 the permissive abstention analysis. And on facts that we think  
12 are really the same as those at issue here, she concluded that  
13 permissive abstention was appropriate.

14 THE COURT: Who were the bankruptcy debtors upon which  
15 1334 removal of jurisdiction was predicated?

16 MS. BOON: I believe there were a couple, Your Honor.  
17 I just need to check that.

18 The bankrupt originator -- it's a fairly long list,  
19 Your Honor. Aegis, Alliance Bancorp, American Home, Bear  
20 Stearns Residential Mortgage Corporation, a subsidiary of  
21 Accredited Home Lenders, First Magnus Financial Corporation,  
22 Freemont, IndyMac, and Southshore Funding.

23 THE COURT: Okay. Has Sealink filed a proof of claim  
24 in the ResCap bankruptcy?

25 MS. BOON: Not to my knowledge, Your Honor. Excuse

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1 me, our client, yes, Sealink, has filed a proof of claim.

2 THE COURT: That's what I -- yes.

3 MS. BOON: Yes, Your Honor.

4 So, Your Honor, I wanted to first just address a  
5 couple of points that you made last week. The first --

6 THE COURT: Well, let me just -- I don't know whether  
7 Deutsche Bank's counsel -- since it's different counsel. I  
8 don't know. Were you here last week during the argument?

9 MR. WOLL: I wasn't, Your Honor, but I reviewed the  
10 transcripts.

11 THE COURT: Okay. So I thought then, and I still  
12 think now -- because Deutsche Bank has filed a proof of claim  
13 in the ResCap bankruptcy.

14 MR. WOLL: That's correct, Your Honor.

15 THE COURT: Right. It seemed to me then and it still  
16 seems to me now, that there is related-to jurisdiction. Claims  
17 for indemnity, a timely proof of claim was filed. Is there  
18 something that distinguishes -- you said that Judge Swain  
19 concluded there was no related-to jurisdiction, and I'm just --  
20 what was the basis for her ruling?

21 MS. BOON: Those proofs of claim were untimely, Your  
22 Honor. Here we have timely proofs of claim.

23 THE COURT: Okay.

24 MS. BOON: So I mean, the only point we would really  
25 make there is that we think the most that would come out of the

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1 claims process would probably be a finding of fraud on the part  
2 of the debtors with respect to three out of the nineteen RMBS  
3 at issue in this action. So we respectfully submit that the  
4 issues of Deutsche Bank's liability for common law fraud,  
5 Deutsche Bank's knowledge, investors' reliance on Deutsche  
6 Bank, are issues that are really the heart of this case. And  
7 this case is just not going to rise or fall on the outcome of  
8 that proof of claim process.

9 THE COURT: So three of the nineteen trusts include  
10 ResCap --

11 MS. BOON: Loans.

12 THE COURT: -- mortgages?

13 MS. BOON: Loans, Your Honor, yes. Two of those  
14 trusts are ResCap trusts, and one of those trusts is actually a  
15 Deutsche Bank D-Vault (ph.) shelf trust.

16 THE COURT: Okay.

17 MS. BOON: Which brings me to really the first point.  
18 Your Honor had raised last week a concern about burdening the  
19 bankruptcy court with discovery over an entire case when only a  
20 small portion of that case has anything to do with the debtors.  
21 That's really the exact situation we have here, Your Honor.  
22 It's undisputed that 2.4 percent of the loans at issue in this  
23 case involved ResCap originators. In other words, Your Honor.  
24 97 percent of the loans in this action have nothing to do with  
25 ResCap. Stepping back from that, eighty-four percent of the

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1 RMBS in this action have nothing to do with ResCap. As I  
2 noted, it's really three of the nineteen at issue in this case.  
3 We submit that that makes this case an extremely good candidate  
4 for abstention.

5 I also just wanted to touch on Your Honor's request  
6 last week that the parties submit any cases where purely state  
7 common law claims are at issue, RMBS cases where judges had  
8 denied remand, other than Judge Rakoff's decision and the Bear  
9 Stearns case.

10 First with respect to Judge Rakoff, we went back and  
11 checked, and over the last couple of weeks, Judge Rakoff issued  
12 his memorandum and opinion which was exclusively devoted to a  
13 discussion of the Edge Act, which is of course not at issue  
14 here, and which was plainly the sole basis for his denial in  
15 that case.

16 There's a reason why, Your Honor, there are no other  
17 cases, as defendants' letter concedes, and as our own research  
18 revealed, and that's because there's really, as Judge Kaplan  
19 noted in the Bayern v. Merrill Lynch and JPMorgan transcript,  
20 which did involve a proof of claim filed in the ResCap  
21 bankruptcy, the tides are running in favor of abstention and  
22 against remand. And I think Your Honor observed that last  
23 week.

24 With that, we're going to spend our time today talking  
25 about mandatory abstention and equitable abstention, which is

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1 really the heart of this action. With respect to mandatory,  
2 defendants again concede that four out of the six relevant  
3 factors are met here. The remaining two are: 1) is there an  
4 independent basis for the court to exercise jurisdiction. And  
5 here defendants assert that Deutsche Bank AG was fraudulently  
6 joined, and also that Sealink, which is an Irish company owned  
7 by a Channel Islands company, is really an organ of Germany.

8 THE COURT: I thought that was interesting, yes.

9 MS. BOON: We think that's a bit of a stretch, Your  
10 Honor, and we can get into that later on. But the second is  
11 that with respect to timely adjudication in state court,  
12 defendants argue that obtaining discovery through the Hague  
13 Convention is slow, basically, and that therefore it would be  
14 faster to move forward in federal court. I'll address each of  
15 those in turn.

16 First on the fraudulent joinder points, I think it's  
17 important to step back and just revisit the standard. And  
18 that's set forth in the Pampillonia case that we provided the  
19 cite to the Court last week, and that's really the burden on  
20 defendants to prove by clear and convincing evidence, either  
21 outright fraud in the pleadings -- which they don't even try to  
22 do -- or that recovery on our claims against Deutsche Bank AG  
23 in state court is legally impossible. And I think that's an  
24 important distinction just to focus on for a second, Your  
25 Honor.

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1                   State court obviously we wouldn't be subject to 9(b)  
2 in state court. I mean, clearly we think that we've done it  
3 here, but the standard is a little bit lower there in state  
4 court.

5                   So I think the first issue is have defendants met  
6 their burden. And here we argue that they haven't. They cite  
7 a couple of motion to dismiss decisions. Though like a motion  
8 to dismiss, all of plaintiff's allegations here are presumed to  
9 be true, the courts are really in accord that the burden on  
10 fraudulent joinder is much heavier than it is on a 12(b)(6)  
11 motion on defendants.

12                  The second issue is really is it possible. And not  
13 only do we think that it's possible, we think that we've done  
14 it. And we think that we've done that specifically in a couple  
15 of ways. With respect to AG, we reference AG expressly in over  
16 a dozen allegations in our complaint. We specifically allege  
17 that AG controlled the other defendants who are actively  
18 participating in the fraud, itself participated in setting  
19 fraudulent policies, and 3) knew about the fraud. And we do  
20 that in a couple of ways, some of which we touched on last  
21 week.

22                  With respect to setting Deutsche Bank's policy of  
23 securitizing egregiously defective loans, we talk about how AG  
24 set up the correspondent lending program, some of the worst  
25 fly-by-night lenders in the industry. Here, Deutsche Bank

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1 agreed to purchase loans from these originators before they  
2 were even originated. We talk about Deutsch Bank AG's  
3 admission in the Mortgage IT settlement that it knew what was  
4 going on and authorized the fraud in Mortgage IT, which is one  
5 of the originators of the RMBS at issue here. And we also talk  
6 about AG's relationships with warehouse lenders, whereby it was  
7 motivated to buy and securitize large numbers of loans from  
8 some of the worst originators regardless of quality. And we  
9 allege that in the complaint.

10         Also with respect to policies, we allege that AG  
11 actively participated in defendant's policy of shorting or  
12 betting against the same RMBS at issue in this case. And that  
13 includes RMBS from the D-Vault shelves, which is one of the  
14 RMBS that defendants have included within the three in their  
15 argument that this is related to the ResCap bankruptcy.

16         But there, we have specific allegations that senior  
17 executives kept Lippmann, who really spearheaded this entire  
18 strategy on a tight leash, that Lippmann specifically discussed  
19 this shorting strategy with Rajeev Misra, a senior executive at  
20 AG, and also that AG was an active participant in the Gemstone  
21 7 CDO, which contained RMBS from a couple of the shelves at  
22 issue in this case, and which the Senate Subcommittee used as a  
23 case study to really exemplify the egregious conduct of Wall  
24 Street banks that caused the financial crisis.

25         And they noted from their study of Gemstone 7, a

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1 number of disturbing concerns. And those are in our complaint.  
2 And the exhibits to the Senate Subcommittee report reveal that  
3 AG was actively involved in creating that CDO.

4 So all those allegations, we think, taken together,  
5 are more than enough. And again, it's not our burden. But  
6 they're more than enough to show that it's possible for us to  
7 state a fraud claim against AG in state court.

8 Moreover -- and we argue this in our opposition papers  
9 to BayernLB's motion to dismiss, and we'll do it again when  
10 it's time to brief our opposition in this case -- we believe  
11 that these allegations are enough to state a fraud claim in  
12 federal court against AG. And it's important here to remember  
13 that in New York, New York common law fraud liability stems  
14 from making, authorizing, or causing a statement to be made.  
15 And that's New York Jurisprudence Section 201. Judge Cote  
16 recently observed this in her Goldman case, where she noted  
17 that sometimes New York courts don't even reference the word  
18 "make" when they're talking about false statements.

19 And these claims have been upheld against parent  
20 entities in state court. For example, in the MBIA v.  
21 Countrywide case, fraud claims were sustained against the  
22 Countrywide parent. We also submitted to the Court Judge  
23 Rakoff's decision --

24 THE COURT: The Dexia opinion.

25 MS. BOON: I'm sorry?

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1           THE COURT: The Dexia opinion, you submitted.

2           MS. BOON: Yes. Sorry, I was moving there. In the  
3 state court, we have MBIA v. Country --

4           THE COURT: Right.

5           MS. BOON: -- just as an example. We have submitted  
6 to Your Honor Judge Rakoff's decision in Dexia v. Bear Stearns,  
7 where he upheld fraud claims against parent entities under  
8 similar allegations to those at issue here.

9           We also just wanted to note that here, we also have  
10 claims for aiding and abetting fraud against AG, and this, of  
11 course, includes fraud, knowledge, and substantial assistance  
12 in the furthering of the fraud. And again, we think our  
13 allegations are enough for fraud, but obviously, we also think  
14 our allegations are enough for aiding and abetting.

15           THE COURT: Just move to the equitable abstention.

16           MS. BOON: Sure. Just very quickly, Your Honor,  
17 before I do that, last week, defense counsel had raised this  
18 sort of question about whether complete diversity applies to  
19 Section A(4). I did some digging yesterday, and I found a  
20 couple more cases holding that it does. In one -- and I have  
21 copies of those, and I'm happy to submit them if that would be  
22 helpful to the Court and to defense counsel.

23           In one of those cases, the plaintiff was actually the  
24 German Free State of Bavaria. So we would respectfully submit  
25 that this is a classic case of even if you're right, you're

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1 wrong. And again, I mean, an Irish company as an organ of  
2 Germany, it is what it is.

3 THE COURT: When we finish the argument, just make  
4 sure you give copies to counsel as well as to -- you can hand  
5 them to my law clerk.

6 UNIDENTIFIED SPEAKER: Maybe just state the name for  
7 the record.

8 MS. BOON: Oh, sure. The case I was just talking  
9 about is German Free State of Bavaria v. Toyobo Corporation,  
10 Ltd. That's 2007 WL 851872. That's Western District of  
11 Michigan. And then I also found another Southern District of  
12 New York case; that's Department of Economic Development v.  
13 Arthur Andersen and that's 924 F. Supp. 449 (S.D.N.Y. 1996).

14 THE COURT: And who wrote that?

15 MS. BOON: Judge [Moo-ka-see].

16 THE COURT: [Mew-kay-zee]?

17 MS. BOON: Mukasey.

18 THE COURT: Okay.

19 MS. BOON: Thank you. I meant to practice that before  
20 but --

21 THE COURT: It's okay.

22 MS. BOON: On permissive abstention?

23 THE COURT: Yes.

24 MS. BOON: Permissive abstention is completely within  
25 the Court's discretion. Defendants refer to the Colorado River

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1 factors but those really only kick in when there's parallel  
2 litigation going on in state and federal court and we're not  
3 aware of any RMBS cases. We cite six of them in our brief that  
4 address these abstention issues that haven't used our standard.  
5 Just by way of an example, that includes Judge Swain in the  
6 Sealink v. Bear Stearns case, Judge Kaplan in BLB v. JPMorgan  
7 and Merrill, and Judge Sullivan in CitiMortgage.

8 So here we have a couple of factors, most of which we  
9 think weigh in favor of the abstention and a couple of which  
10 are probably arguably neutral.

11 The first is comity. Clearly, we have only state law  
12 issues in this case.

13 The second, state law predominates. No federal or  
14 bankruptcy issues involved here.

15 The third, novel state law issues. It's probably a  
16 closer question but, as Judge Kaplan noted in the BayernLB  
17 decision, sometimes we think issues are settled and they become  
18 unsettled down the line. And here I'll just note that  
19 defendants have raised two arguments in their motion to dismiss  
20 briefing that we've never seen before in these types of cases,  
21 so who knows?

22 With respect to the jury trial, obviously the parties  
23 have a right to a jury trial. We would argue that weighs in  
24 favor of abstention. The relation to the underlying --

25 THE COURT: Who has the motion to withdraw the

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1 reference in this case? Is it also Judge Gardephe?

2 MS. BOON: No. It's Judge Furman.

3 THE COURT: Has -- he hasn't set argument?

4 MS. BOON: We haven't heard anything from him, Your  
5 Honor.

6 THE COURT: Is it fully briefed?

7 MS. BOON: It is.

8 MR. WOLL: Perhaps they think Your Honor will decide  
9 this motion and they don't have to --

10 THE COURT: I know that Judge Gardephe has his hands  
11 full at the moment.

12 MR. WOLL: He is.

13 THE COURT: I don't know about Judge Furman.

14 MS. BOON: Just to finish up the permissive --

15 THE COURT: Go ahead.

16 MS. BOON: -- abstention factors, Your Honor. The  
17 relation to the underlying Chapter 11 proceeding, we would  
18 submit that it's pretty remote; only 2.4 percent of the loans  
19 at issue involve ResCap debtors.

20 And then the effect on the administration of the  
21 bankruptcy estate; again, we realize that there may be some  
22 discovery demands on the debtors and we would just -- we would  
23 just submit that that question we don't think is really as  
24 clear as perhaps defendants would like it to be because here we  
25 have tons of allegations in our complaint about DBSI, the

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1 underwriter for all the securities, including the two ResCap  
2 securities that defendants have put in their papers.

3 And, at least in our Rakoff case -- and admittedly,  
4 that could be because we're an a Rakoff schedule -- but we  
5 haven't had to make a motion to lift the stay in that case,  
6 even though there are ResCap RMBS involved there, because it  
7 turns out that all the discovery is with the debtor. So -- or,  
8 excuse me, with the underwriters. And the same could be true  
9 here. It's probably just too soon to say.

10 THE COURT: I didn't raise this last week but one of  
11 the -- at least I don't think so. In both Bayerische and  
12 Sealink, proofs of claim filed by the plaintiffs, proofs of  
13 claim filed the defendants, I am -- in all likelihood, I'm  
14 going to have to deal with the -- not the underlying issues of  
15 Deutsche Bank's liability, but they're going to lay it off on  
16 the ResCap defendants, okay? So remanding the case is not  
17 going to eliminate at least some of the issues. I mean, part  
18 of it is that ninety-six percent or whatever of the securities  
19 involved are not ResCap -- of the mortgages are not ResCap  
20 mortgages. I've got enough to deal with this ResCap. But it's  
21 not as if I'm going to totally -- unless there's some  
22 consensual resolution, I'm not going to totally avoid the  
23 issues in your case that relate to ResCap.

24 MS. BOON: I think that's probably fair to say, Your  
25 Honor. But I would just note that the vast majority of the

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1 issues in our case have nothing to do with ResCap and --

2 THE COURT: That's true.

3 MS. BOON: -- I think that's really the point. And,  
4 you know, to the extent that there's overlap or to the extent  
5 that we need to discov -- that we need to ask this Court for  
6 discovery, as Your Honor pointed out last week, it's a lot  
7 easier to deal with a one-off request in isolation than it is  
8 to manage an entire case, ninety-seven percent of which has  
9 simply nothing to do with the ResCap debtors.

10 THE COURT: That's fair.

11 MS. BOON: With that, Your Honor, I'll just conclude  
12 on permissive abstention by referring you, again, to Sealink --  
13 by referring the Court to Sealink v. Bear Stearns, where Judge  
14 Swain decided that equitable abstention was appropriate,  
15 holding "that any effect on the bankruptcies would be so  
16 attenuated and tangential that the court would exercise its  
17 discretion to abstain." And again, I would also note that  
18 Kaplan also remanded one through the permissive abstention  
19 analysis, even though there was a ResCap claim.

20 THE COURT: Just tick off for me -- the judges in the  
21 Southern District --

22 MS. BOON: Yes.

23 THE COURT: -- who had remanded on permissive  
24 abstention grounds: Judge Kaplan.

25 MS. BOON: Judge Kaplan.

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1 THE COURT: Judge Sullivan? I mean --

2 MS. BOON: Judge Sullivan.

3 THE COURT: -- Judge Sullivan's decision, he sort of  
4 covered -- all of them cover all of the bases but I -- at least  
5 I think part of what I read in Judge Sullivan included  
6 permissive abstention.

7 MS. BOON: Judge Sullivan stuck in a footnote and said  
8 but for federal claims, I'd find mandatory abstention was  
9 appropriate but his focus was on permissive.

10 THE COURT: Right. All right. So --

11 MS. BOON: And then you also have, again, Judge Swain  
12 in Sealink. So permissive, it would be --

13 THE COURT: So Swain, Sullivan, Kaplan.

14 MS. BOON: And Kaplan.

15 THE COURT: Anybody else?

16 MS. BOON: And then you just -- you have a couple on  
17 mandatory abstention. Nobody else of permissive that I'm aware  
18 of.

19 THE COURT: Who else on mandatory sending it back?

20 MS. BOON: Mandatory you have Judge Buchwald in  
21 Allstate v. Credit Suisse.

22 THE COURT: Okay.

23 MS. BOON: You have -- and you have Judge Sand in the  
24 Allstate v. --

25 THE COURT: Right.

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1 MS. BOON: -- Ace Securities case.

2 THE COURT: I thought he mentioned -- I thought that  
3 Judge Sand -- didn't he mention -- I didn't bring the copy of  
4 that case out; it's sitting on my desk. I thought he mentioned  
5 permissive abstention as -- I mean, typically, the judges have  
6 covered their bases and indicated, yeah, I'll send it -- I'll  
7 remand it on mandatory abstention grounds but -- but if I  
8 didn't, I would do it on permissive abstention grounds. I  
9 don't -- I have to go back and look at Judge Sand. And lined  
10 up against those five would be Judge Rakoff?

11 MS. BOON: Would be Judge Ra -- and again, that's just  
12 the Edge Act, Your Honor.

13 THE COURT: Right.

14 MR. WOLL: Your Honor, I do have the Allstate v. Ace  
15 and Judge Sand found both mandatory and equitable abstention.

16 THE COURT: That was my -- that was my recollection.

17 MR. WOLL: Yes.

18 MS. BOON: That's right, Your Honor.

19 THE COURT: All right. Thank you very much.

20 MR. WOLL: Your Honor, David Woll on behalf of  
21 defendants. Let me, if I may, let me start with equitable  
22 abstention because I think that's kind of where the lines are  
23 drawn here. And I read the transcript, as I said, of the  
24 argument last week and I've heard Your Honor's comments. I  
25 understand that there's --

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1           THE COURT: State court's a very nice place to be.

2           MR. WOLL: I've been there often, Your Honor, and I do  
3 agree that it's a nice place to be. But I wanted to pick up on  
4 the one comment you made, which I think is probably the best  
5 argument we have for the Court not to abstain. And that is  
6 that the issues in the Sealink case that do touch upon the  
7 ResCap entities will have to be addressed in this bankruptcy  
8 court. And while there are a majority of claims in the Sealink  
9 case that relate to non-ResCap securitizations, in real  
10 numbers, the amount of the claims that do are quite  
11 significant. We're talking about 120 million dollars' worth of  
12 securities, we're talking --

13           THE COURT: Look, I have to tell you. The numbers in  
14 all of these cases are absolutely staggering. The appetite  
15 that particularly foreign investors seem to have had for RMBS  
16 securities was enormous.

17           MR. WOLL: Yes. And there are a lot of loans involved  
18 in those securitizations. We calculate there's, give or take,  
19 4,000 loans at issue that were originated by a ResCap entity or  
20 were in the deal sponsored by a ResCap --

21           THE COURT: And how many loans originated by non-  
22 ResCap entities?

23           MR. WOLL: Well, many more than that, I concede. I  
24 don't know what the number is. But we are going to have to  
25 come to Your Honor for -- yeah.

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1           THE COURT: But I have the ability to estimate claims  
2 without having a trial. I mean whether you -- look, you -- I  
3 don't know whether you took a position on the motion to  
4 withdraw the reference or not. It sounds like everybody wants  
5 to be in the district court. Whether you're in the district  
6 court or this court, the cases -- barring a settlement, the  
7 cases are not going to resolved any time soon. They're just  
8 not. You know, Judge Rakoff, in Flagstar, you know, I think it  
9 was kind of a test case trial; maybe cases will settle after he  
10 did what he did there. But the federal courts and the state  
11 courts -- not only in New York but elsewhere -- are flooded  
12 with mortgage relate -- RMBS cases.

13           MR. WOLL: That's true, Your Honor.

14           THE COURT: Okay. And if the bankruptcy court had to  
15 wait for those cases to be fully litigated to judge -- final  
16 judgment before it could resolved claims issues, you know, it  
17 might be in the next decade. Okay. But that's not what we do  
18 or what we have to do, okay? There are estimation proceedings  
19 for both voting and allowance purposes. So what I have to deal  
20 with, with respect to the indemnity claims that Deutsche Bank  
21 has filed --

22           MR. WOLL: Right.

23           THE COURT: -- or the plaintiff's claims that have  
24 been filed -- and I guess you know that there's a subordination  
25 adversary proceeding that's been filed and -- there's been a

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1 motion and an adversary proceeding filed about it -- they're on  
2 very different glide paths to resolve. Okay. Let alone the  
3 fact that ninety-seven percent of the mortgages involved in  
4 this case have nothing to do with ResCap.

5 MR. WOLL: Your Honor, I --

6 THE COURT: So, yes, I do -- I'm not -- if I remand  
7 the case and if -- if I remand the case it winds up back in  
8 state court, no, it doesn't end the possibility that I'll have  
9 to deal with these issues at some point in the future.

10 MR. WOLL: Right.

11 THE COURT: That's true. Some of the issues.

12 MR. WOLL: Well, and that the debtors will also have  
13 to deal with them because a lot if the issues involved --  
14 although the allegations here are about Deutsche Bank as you  
15 indicated -- there are follow-on issues that involve the  
16 debtors, not just with respect to the indemnity claims but  
17 the -- one of the essential elements of the allegations here is  
18 that the mortgages originated by debtor entities didn't comply  
19 with their underwriting guidelines. And so discovery about how  
20 the loans were originated, about the loan files, about the  
21 processes all related to that, issues that the debtor, I  
22 think, will have a deep and abiding interest in --

23 THE COURT: They won't --

24 MR. WOLL: -- all have to be dealt with for these  
25 three securitizations that present significant liabilities --

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1                   THE COURT: Right.

2                   MR. WOLL: -- potential liabilities, albeit, but  
3 they're included.

4                   THE COURT: But not for the other sixteen.

5                   MR. WOLL: True. That's true, Your Honor. And I  
6 can't refute that.

7                   With respect to mandatory abstention, let me just  
8 address that quickly. I think we are -- both sides are in  
9 agreement that if there was improper or fraudulent joinder of  
10 DBAG, then mandatory abstention wouldn't apply because it would  
11 be a separate basis for the Court to exercise federal  
12 jurisdiction. And with respect to that -- and I read Your  
13 Honor's comments at the hearing last week or your question as  
14 to how are these allegations different, essentially, from the  
15 basic relationship between a corporate parent and a subsidiary  
16 that exists in all sorts of situations.

17                   We don't think they are. And the allegations against  
18 DBAG and the complaints, although counsel did a very good job  
19 of making the most of them, are actually very sparse. And if  
20 you go through the different allegations that have been made --  
21 and I'll walk through them just quickly, we think it's clear  
22 that they don't state any kind of viable claim against DBAG. I  
23 mean the first allegation, which is based on a FINRA filing, is  
24 that DBAG is a parent and, effectively, a control entity, with  
25 respect to Deutsche Bank Securities and Deutsche Bank Specialty

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1 Products.

2 The same filing says that Deutsche Bank AG, which is a  
3 German bank and a parent company, also has the same  
4 relationship with dozens of other entities. That doesn't prove  
5 anything in terms of fraud or knowledge. The Pampillonia case,  
6 which counsel cited, actually dealt with a very similar  
7 circumstance and agreed that improper or fraudulent joinder  
8 applied in a situation where the allegations were against a  
9 parent corporation and didn't establish any basis for liability  
10 against the parent corporation, other than the fact that there  
11 was a relationship -- a parent-subsidiary relationship between  
12 the parents and the subsidiary.

13 With respect to the settlement, the MIT settlement,  
14 respectfully, there was no admission of fraud in that  
15 settlement agreement at all. And the claims there didn't  
16 involve the issues here. Those claims related to HUD and HFA  
17 regulations and whether loans that were submitted for,  
18 basically, an FHA guarantee complied with regulations of HUD  
19 and HFA. It's not even clear that any of those loans would be  
20 part of any of the securitizations at issue here. DBAG did not  
21 admit any type of fraudulent conduct with respect to that  
22 settlement. Those loans were guaranteed by the HFA so there  
23 wouldn't be any losses on them anyway. It's a complete red  
24 herring and a totally different circumstance. It doesn't  
25 support any kind of fraud against DBAG.

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1           Their allegations that, based on a newspaper article  
2 or an article from -- I had it here someplace. Oh, here we go;  
3 the American Banker. That DBAG is supposedly ran the  
4 Correspondent Lending Group at Deutsche Bank. Well, the  
5 article -- and we address this in our motion to dismiss which  
6 we've already filed -- the article says that Deutsche Bank  
7 securities, which is a unit of Deutsche Bank AG, runs the  
8 Correspondent Lending Group. So the allegation's based on a  
9 misreading of an article in the American Banker. Again,  
10 insufficient to state any claim for fraud.

11           The allegations about the "short position". If you  
12 look at the complaint, the -- and in their reply on this  
13 motion, the plaintiffs cite the allegations in the complaint  
14 that they're relying on to support their argument that DBAG is  
15 a proper defendant. They cite paragraph 139. It doesn't even  
16 mention Deutsche Bank AG. They do drop a footnote in the  
17 complaint that says that Deutsche Bank AG was "heavily involved  
18 in the Gemstone 7 CDO." That's the only mention of Deutsche  
19 Bank AG with respect to this so-called shorting allegation in  
20 the complaint is that it was supposedly heavily involved in  
21 this Gemstone transaction.

22           Well, that transaction was actually the subject of  
23 litigation in state court and there's a decision, which we  
24 actually didn't cite in our papers but I would like to bring to  
25 the Court's attention. It's a claim -- a case called M&T Bank

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1 Corp v. Gemstone CDO 7, Ltd., in New York Supreme in Erie  
2 County, where the court dismissed claims against Deutsche Bank  
3 AG based specifically on that transaction and said that the  
4 allegations of Deutsche Bank AG's involvement in that  
5 transaction were insufficient to state a claim with respect to  
6 fraud-based claims. So we think the allegations here are even  
7 less adequate than the allegations were there. Plain --

8 THE COURT: Just --

9 MR. WOLL: Yeah, go ahead.

10 THE COURT: Let me just ask you this. Just focus on  
11 permissive abstention --

12 MR. WOLL: Oh, okay.

13 THE COURT: -- and tell me why, in your view, I  
14 shouldn't do what other judges in the Southern District have  
15 done and remand -- they've remanded similar cases, similar  
16 claims to state court on permissive abstention grounds.

17 MR. WOLL: Well, some of the -- some of the decisions,  
18 as I think counsel and Your Honor discussed, were based on the  
19 absence of a timely proof of claim. Some of the decisions, I  
20 think, were based on, for instance, Judge Kaplan's conclusion  
21 that there were potentially novel issues of law.

22 THE COURT: Well, but Judge Kaplan, in Bayerische,  
23 concluded that there was related-to jurisdiction.

24 MR. WOLL: Yes, absolutely. Yes. And -- I mean, as I  
25 read his decision, he mentioned that there may be novel issues

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1 of law. I don't see any novel issues of law here. It's pretty  
2 straightforward -- I mean, there might be novel factual  
3 allegations but the law is pretty straightforward common law  
4 fraud theories which this court and the district court deal  
5 with on a regular basis. So I don't think there're any novel  
6 issues.

7 With respect to comity, I don't think that poses any  
8 problems at all. I don't think the New York courts would be  
9 offended in the least if this court held onto this case. I  
10 also don't think the jury trial issue is really relevant  
11 because, as I think Your Honor mentioned at the hearing last  
12 week, if that becomes an issue at some point --

13 THE COURT: It isn't going to be here.

14 MR. WOLL: Right. Exactly. So --

15 THE COURT: But why shouldn't this case be coordinated  
16 with the two other Sealink cases that are pending in the  
17 commercial division at this point?

18 UNIDENTIFIED SPEAKER: Six others.

19 THE COURT: Six others. Isn't that the more efficient  
20 way of litigating these cases, to have them all before one  
21 judge who can regulate and coordinate discovery, assure  
22 consistency or avoid inconsistency in rulings in the cases?

23 MR. WOLL: Well, Your Honor, first of all, I don't  
24 think that's necessarily the case. I mean, the Sealink -- the  
25 only thing common about the Sealink cases is the plaintiff.

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1 There are lots of different defendants with lots of different  
2 securitizations and lots of different --

3 THE COURT: And you think there's -- I don't even know  
4 why I'm going to ask this question but I can't imagine there  
5 are enormous differences in the offering documents for any of  
6 those other deals.

7 MR. WOLL: Well, they do -- I mean --

8 THE COURT: Have you looked at them?

9 MR. WOLL: I haven't -- I have general experience  
10 with, you know, comparing different --

11 THE COURT: How many of these types of cases are you  
12 defending?

13 MR. WOLL: I'm not sure Your Honor; twenty or so.  
14 But -- so I don't know about the specific pro supps in those  
15 cases. There is a fairly wide variation in the pro supps. But  
16 I take your point. Some of the basic issues are the same but  
17 the operations of the defendants and the allegations against  
18 the defendants and what they did are different. I mean --

19 THE COURT: How many cases involving Deutsche Bank are  
20 pending in -- RMBS cases are pending in the commercial  
21 division?

22 MR. WOLL: I could guess, Your Honor, but I don't know  
23 for a certainty.

24 THE COURT: What's your estimate of the number of RMBS  
25 cases involving Deutsche Bank that are currently pending in the

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1 commercial division?

2 MR. WOLL: Could I just --

3 THE COURT: Sure. Go ahead. Yes.

4 MR. WOLL: We're coming off with three or four that  
5 involve these types of claims. There are the put-back or  
6 repurchase type claims, which Your Honor was talking about  
7 earlier in terms of the trust settlement, I guess, that's --

8 THE COURT: Correct.

9 MR. WOLL: -- in the works here. That's kind of a  
10 different story so --

11 THE COURT: Yes. I understand.

12 MR. WOLL: So three or four like this is my estimate.

13 THE COURT: Okay.

14 MR. WOLL: So, I mean, in terms of timeliness of  
15 adjudication, I mean, if we're talking about whether this case  
16 would proceed more quickly in federal court or proceed more  
17 quickly if it were sent back for coordination with all those  
18 different defendants in all those other different suits, I  
19 don't know what the schedule would be in those other cases but  
20 my hunch is that it would take longer to deal with all those --

21 THE COURT: I don't think so. Usually, when one judge  
22 is coordinating all of the cases involving plaintiff and  
23 defendant, that that's the most efficient and fastest way of  
24 dealing with it. The judge -- the commercial division is very  
25 experienced in dealing with complex civil litigation, and

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1 scheduling orders will be entered and the cases will proceed.  
2 I mean, you know, so I'm assuming, if these cases ever end up  
3 in jury trials, whether it was in the district court or in the  
4 state court, it's a long time before that happens. You know,  
5 whether they'll get to that point or not, I don't know.

6 And if they stay -- if they were to stay here, they'd  
7 stay here until -- in all likelihood, until they were ready for  
8 a jury trial and then they'd go to the district court. If the  
9 district court wanted to withdraw the reference before, it  
10 would do that. But --

11 MR. WOLL: Well, if this case and the Bayerische case  
12 stay here, then you could coordinate the Deutsche Bank  
13 allegations together.

14 THE COURT: Sure.

15 MR. WOLL: But, Your Honor, I hear your points and I  
16 really don't think I have anything else --

17 THE COURT: Okay.

18 MR. WOLL: -- to offer you so --

19 THE COURT: Thank you very much.

20 MR. WOLL: -- thank you.

21 THE COURT: I appreciate it.

22 Any reply?

23 MS. BOON: No.

24 THE COURT: Any brief reply?

25 MS. BOON: I think we're done.

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1           THE COURT: Okay. I'm going to take it under  
2 submission and I expect to get out rulings in both Bayerische  
3 and this case -- and Sealink, roughly contemporaneous. So when  
4 that's going to be, I'm not quite sure yet but we'll see.  
5 Okay? Thank you very much.

6           MR. WOLL: Thank you.

7           MS. BOON: Thank you.

8           THE COURT: I appreciated the briefing.

9           MR. WOLL: Thank you, Your Honor.

10          THE COURT: The briefing was really quite well done.  
11 Both sides. I want to make that --

12          MS. BOON: Thank you.

13          (Whereupon these proceedings were concluded at 12:26 PM)

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## I N D E X

## RULINGS

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1 C E R T I F I C A T I O N  
2

3 I, Sharona Shapiro, certify that the foregoing transcript is a  
4 true and accurate record of the proceedings.  
5

6 *Sharona Shapiro*  
7

8 \_\_\_\_\_  
9 SHARONA SHAPIRO

10 AAERT Certified Electronic Transcriber CET\*\*D-492  
11

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15  
16 Date: March 6, 2013  
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